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83-5365

IN THE SUPREME COURT

OF

THE UNITED STATES OF AMERICA

CHARLIE YOUNG, JR.,	)	
	)	
Petitioner	)	October Term, 1983
	)	
vs.	)	
	)	
THE STATE OF GEORGIA,	)	Case No._____
	)	
Respondent	)	

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF GEORGIA

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QUESTIONS PRESENTED FOR REVIEW

I. Can the State of Georgia, consistently with the Double Jeopardy Clause of the Fifth Amendment and the Due Process Clause of the Fourteenth Amendment, try petitioner for murder and sentence him to death a second time under Georgia's death penalty law, after he has been previously tried, convicted, and sentenced to death for the same offense on the basis of the same statutory aggravating circumstances, and after a federal district court has ruled, in his habeas corpus case under 28 U.S.C. §2254, that the evidence presented at his first trial was insufficient to support the jury's finding of the statutory aggravating circumstances relied upon by the state beyond a reasonable doubt, and such district court ruling was not disturbed on appeal?

II. Can the State of Georgia, consistently with the Double Jeopardy Clause of the Fifth Amendment and the Due Process Clause of the Fourteenth Amendment, try petitioner for murder and sentence him to death a second time under Georgia's death penalty law, on the basis of a statutory aggravating circumstance not submitted to the jury at his first trial?

III. Did the Supreme Court of Georgia misinterpret and misapply the decision of the United States Court of Appeals in Young v. Zant, 677 F.2d 792 (11th Cir. 1982)?

PARTIES INVOLVED IN THIS LITIGATION

The only parties involved in this litigation are Charlie Young, Jr., and the State of Georgia. However, a special prosecutor is participating in the case on behalf of the Farmers Bank of Union Point, Georgia.

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CITATION TO OPINION BELOW

The judgment and opinion of the Supreme Court of Georgia in this case is reported at 251 Ga. 153, 251 GLR 114 (1983), and is set out in Appendix A to this petition. (See pp. A-1 - A-4).

STATEMENT OF JURISDICTION

The court has jurisdiction over this petition for Writ of Certiorari under 28 U.S.C. §1257(3). The judgment of the Supreme Court of Georgia was entered May 25th, 1983. A Motion for Rehearing was filed and an Order was entered denying such motion on July 7th, 1983. A copy of this Order denying rehearing is set out in Appendix A to this petition. (See p. A-5).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Double Jeopardy Clause of the Fifth Amendment to the Constitution of the United States, which provides:

> "... nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; ...."

and the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, which provides:

> "... nor shall any state deprive any person of life, liberty, or property, without due process of law; ...."

2. This case involves Ga. Code Ann. §27-2534.1(b)(2) (now O.C.G.A. §17-10-30(b)(2)), which provides:

> "(b) In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his

instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:

(2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree;"

3. This case involves Ga. Code Ann. §27-2534.1(b)(4) (now O.C.G.A. §17-10-30(b)(4)),which provides:

"(b) In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:

(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value."

4. This case involves Ga. Code Ann. §27-2534.1(b)(7) (now O.C.G.A. §17-10-30(b)(7)),which provides:

"(b) In all cases of other offenses for which the death penalty may be authorized, the judge

shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:

(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim;"

STATEMENT OF THE CASE

A. The case in the State Court system and on direct appeal. On December 15th, 1975, Reuben H. Flynt, Vice President of the Farmers Bank of Union Point, Georgia, was killed at his home. Police investigation revealed that the petitioner, Charlie Young, Jr.[1], and his nephew, Derwin Young, had driven from Atlanta to Union Point on the morning of December 15th, 1975, so that petitioner could discuss with Mr. Flynt certain notices he had received from the bank concerning delinquencies in his payment of loans. Petitioner drove to the bank, to Mr. Flynt's house, and then back to the bank and to Mr. Flynt's house again before locating Flynt's car. Petitioner went to the door of Flynt's house and rang the doorbell, but was rebuffed by Flynt who told him to come see him at the bank in thirty minutes. Appellant then returned to the car, got a .22 caliber pistol, and returned to Flynt's house where he asked to use the telephone to call his grandmother. After trying unsuccessfully to reach his grandmother, petitioner again tried

[1] Petitioner, a young black man, has been described as "articulate" and "college-trained." He once received a job recommendation from the Sheriff of Greene County. See Young v. Ricketts, 242 Ga. 559, 560-61.

to talk with Flynt concerning the outstanding loans. An argument ensued, Young and Flynt struggled, and Young shot Flynt several times with the pistol at close range. Petitioner was slightly injured in the altercation. Petitioner then ripped the telephone from the wall, took Flynt's wallet from his rear pocket, and left.

Petitioner and his nephew drove back to the bank. Petitioner then gave his nephew the wallet, and told him to go into the bank and give it to Mr. Stewart (the President of the bank) and to get $60,000. Derwin Young subsequently entered the bank, approached a teller, handed her the billfold, and said, "The man that gave me this billfold said for you to give me $60,000 or he will kill Reuben Flynt in fifteen minutes." The President of the bank directed the teller to comply, and she placed approximately $10,000 in a bag and gave it to Derwin Young. Meanwhile, the police had been alerted, and Derwin Young was arrested upon leaving the bank. The petitioner was not seen at the bank, but was later found at his grandmother's house, where he was arrested. A .22 caliber pistol was discovered beneath the driver's seat of the car he had been driving. Bullets later removed from the victim's body were determined to have been fired from this pistol. The victim died from loss of blood due to the gunshot wounds and several lacerations on his head, which were inflicted by the petitioner with the butt of the gun during the struggle.

After he was arrested and advised of his Miranda rights, petitioner gave a statement recounting the events of December 15th, 1975. Petitioner admitted struggling with Flynt, striking him, and shooting him with the pistol, but denied that he had gone to Flynt's house for the purpose of robbing him. Petitioner instead maintained that he had not decided to attempt to obtain money from the bank by the use of Flynt's wallet until after the

fatal altercation had occurred. Petitioner also gave consent for the police to search the automobile, and it was after this consent was given that the police found the pistol underneath the seat of the car.

Petitioner was tried and convicted of murder, armed robbery, and robbery by intimidation in the Superior Court of Greene County as a result of the events of December 15th, 1975. He was sentenced to death for murder, to life imprisonment for armed robbery, and to twenty years' imprisonment for robbery by intimidation. The aggravating circumstances relied upon by the State in seeking the death penalty were Ga. Code Ann. §27-2534.1(b)(2) (now O.C.G.A. §17-10-30(b)(2)) (that the murder was committed during the course of an armed robbery), and §27-2534.1(b)(4) (now O.C.G.A. §17-10-30(b)(4)) (that the murder was committed for the purpose of obtaining money).

Petitioner appealed these convictions to the Supreme Court of Georgia, contending, among other things, that the aggravating circumstances had not been proved beyond a reasonable doubt. The Supreme Court of Georgia affirmed the convictions and the death sentence. Young v. The State, 237 Ga. 852, 230 S.E.2d 287 (1976). A copy of this opinion is included in Appendix A to this petition. (See pp. A-6-A-11).

Petitioner subsequently filed a petition for writ of habeas corpus in the State Court system, challenging the effectiveness of his trial counsel. This petition was denied, and the Supreme Court of Georgia affirmed. Young v. Ricketts, 242 Ga. 559, 250 S.E.2d 404 (1978), cert. denied, 442 U.S. 934, 99 S.Ct. 2870, 61 L.E.2d 304 (1979).

B. The case in the federal court system. Petitioner then initiated a habeas corpus proceeding in the United States District Court for the Middle District of Georgia, claiming that his trial counsel had been ineffective at both stages of his

bifurcated trial, and that the evidence was insufficient to support the jury's finding of aggravating circumstances. The District Court set aside the death sentence, ruling that petitioner received ineffective assistance of counsel during the sentencing phase of his trial. As an additional ground for its ruling, the District Court found that the evidence presented at petitioner's trial was "... not legally sufficient to support the jury's finding beyond a reasonable doubt that the murder was committed in the course of an armed robbery or for the purpose of obtaining money." Young v. Zant, 506 F.Supp. 274, 280 (M.D. Ga. 1980). A copy of the District Court's order and opinion is attached as a part of Appendix A to this petition. (See, pp. A-12- A-19). The District Court explained its ruling as follows:

> Petitioner also asserts as a basis for habeas corpus relief that the evidence at trial did not support the jury's finding of statutory aggravating circumstances contained in Ga. Code Ann. §27-2534.1(b)(2), that the murder was committed during the course of an armed robbery, and §27-2534.1(b)(4), that the murder was committed for the purpose of obtaining money. Having carefully considered all the evidence presented at trial, the court finds that the evidence was not legally sufficient to support the jury's finding beyond a reasonable doubt that the murder was committed in the course of an armed robbery or for the purpose of obtaining money. The only relevant evidence presented at trial indicated that petitioner did not contemplate the taking of any money until after the shots had been fired and the blows had been struck, i.e., after the murder had been committed. See, testimony of F.B.I. Agent Kane, Trial Transcript, pp. 372-373. Based on the evidence presented at trial that petitioner prior to the commission

> of the murder had any intent to rob the victim is only speculation. Certainly the evidence does not prove these aggravating factors beyond a reasonable doubt. Considering the evidence in this case and the plain language of Ga. Code Ann. §27-2534.1(b)(2) and (4), the removal of the victim's wallet and the attempt to obtain money from the bank cannot be considered as aggravating factors of the already committed murder. Petitioner was therefore sentenced to death based on an improper finding of aggravating circumstances, and for this reason must be resentenced. 506 F.Supp. 280-81. (Emphasis original)

The District Court denied relief as to the guilt or innocence phase of petitioner's trial, rejecting petitioner's claims that he was not afforded effective assistance of counsel during that phase of the proceedings in the Superior Court of Greene County.

The State of Georgia subsequently appealed the District Court's ruling ordering a new sentencing trial to the United States Court of Appeals for the Eleventh Circuit. Petitioner cross-appealed from the District Court's denial of relief as to the guilt or innocence phase of the trial. On May 14th, 1982, the Eleventh Circuit issued an opinion reversing the District Court's denial of the writ of habeas corpus with respect to the guilt or innocence phase of the trial. Young v. Zant, 677 F.2d 792, 800 (11th Cir. 1982). A copy of the opinion of the Eleventh Circuit is attached as a part of Appendix A to this petition. (See, pp. A-20- A-28).

The Court of Appeals recognized that the District Court had found, as an alternative ground for reversal of the death sentence, that the evidence was insufficient to support the finding of the two aggravating circumstances relied upon by the State:

The District Court concluded that the undisputed evidence showed that Flynt was completely incapacitated before Young formed the intent to rob him. Thus, the Court reasoned, the State had failed to prove that any of the essential elements of armed robbery, the taking of property from a person "by use of an offensive weapon" Ga. Code Ann. §26-1902 occurred prior to the assault; nor had it shown that Young's purpose in assaulting Flynt was to obtain money. 677 F.2d at p.794, n.3.

The Court of Appeals made no other references to the portions of the District Court's order regarding the sentencing phase of petitioner's trial, with one exception. In reviewing the District Court's ruling that petitioner had received effective assistance of counsel at the guilt or innocence phase of his trial, the Court of Appeals noted:

> (T)he District Court, in assessing the sufficiency of the State's evidence of aggravating circumstances on the malice murder charge, concluded that the State did not produce sufficient evidence to permit the jury to find beyond a reasonable doubt that Young had formed the intent to rob Flynt prior to the fatal assault. Young v. Zant, 506 F.Sup. at 280-81. This deficiency in the evidence should have been sufficiently clear to trial counsel to suggest a strong argument that Young did not rob Flynt by the use of an offensive weapon and thus could not be guilty of armed robbery under Ga. Code Ann. §26-19-02. 677 F.2d at p.799

In this connection, the Court of Appeals also observed:

> Curiously, the District Court did not discuss the legal effect of Flynt's incapacity, and therefore Young's taking without "use of an offensive weapon" on the validity of Young's conviction for armed robbery. This

might have been due to petitioner's failure to make the claim that the State's evidence was insufficient under the standard set forth in Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781 (1979). 677 F.2d at p. 794, n.3.

The judgment of the Court of Appeals provided:

> The District Court's denial of the writ of habeas corpus with respect to the guilt phase of Charlie Young's trial is therefore REVERSED. On receipt of the mandate, the District Court shall grant the writ." 677 Fed.2d at p.800.

C. Subsequent proceedings in the state court system. Charlie Young's case was subsequently returned to the Superior Court of Greene County, where he was reindicted for murder, armed robbery and robbery by intimidation. On December 8th, 1982, the State served petitioner's counsel with "Notice of Statutory Aggravating Circumstances", listing the following aggravating circumstances in support of the State's second request for the death penalty:

> 1. The offense of murder of REUBEN FLYNT was committed while the offender, CHARLIE YOUNG, was engaged in the commission of another capital felony, to-wit: armed robbery of REUBEN FLYNT.
>
> 2. The offender, CHARLIE YOUNG, committed the offense of murder of REUBEN FLYNT for the purpose of receiving money or other things of value for himself.
>
> 3. The offense of murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

A copy of this "Notice of Statutory Aggravating Circumstances" is included in the Appendix to this petition. (See p. A-29).

Young subsequently filed a plea of former jeopardy, contending that his rights under the Fifth and Fourteenth Amend-

ments to the Constitution of the United States would be abridged if the State were allowed to rely on the same aggravating circumstances relied upon at his first trial, (aggravating circumstances nos. 1 and 2 above), and that his rights under the Fifth and Fourteenth Amendments would be abridged if the State were allowed to seek the death penalty at all at his second trial. This plea was overruled by the trial court, and petitioner took a direct appeal to the Supreme Court of Georgia. (See Patterson v. State, 248 Ga. 875, 287 S.E.2d 7 (1982), holding that an order overruling a plea of former jeopardy is an appealable order under Georgia law, without resort to interlocutory appeal procedures. See, similarly, Abney v. United States, 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1976)).

On May 25th, 1983, the Supreme Court of Georgia issued its opinion and judgment in the case affirming the trial court's ruling on petitioner's plea of former jeopardy. The Supreme Court of Georgia interpreted the decision of the Court of Appeals in Young v. Zant, supra, as follows:

> Although the District Court and Court of Appeals were in agreement as to the invalidity of Young's death sentence, we interpret the opinion of the Court of Appeals as a reversal of the District Court. The Court of Appeals held that "(a)n examination of the record of the trial makes it plain that (defense counsel) did not accord Young even a modicum of professional assistance at any time." 677 Fed.2d at pp. 794-5. Rather than reversing in part and affirming in part, the Court of Appeals chose to substitute its opinion for that of the District Court.
>
> We perceive that the effect of this reversal was to nullify the entire opinion of the District Court and to place the parties in the position quo ante, subject,

of course, to the holdings of the Court of Appeals. 251 GLR at p.116.

The Supreme Court of Georgia then went on to conclude that the decision of the United States Court of Appeals had been based solely upon ineffective assistance of counsel, and that petitioner could, therefore, be resentenced to death on the basis of the same aggravating circumstances submitted to the jury at his first trial,

> ... as Jackson v. Virginia, 443 U.S. 307 (99 S.C. 2781, 61 L.E.2d 560) (1979), which sets out the constitutional standard for review of the sufficiency of the evidence, was not relied on by either the District Court or the Court of Appeals ....
>
> Absent a reliance upon Jackson v. Virginia, supra, in support of that determination, we conclude that the Court of Appeals' observations related to the weight of the evidence rather than constitutional sufficiency ....
>
> We therefore adhere to our former ruling that "(a) review of the evidence adduced by the State in this case shows that it is legally sufficient to support the finding by the jury of ... aggravating circumstances [(b)(2) and (b)(4)]. Young v. State, supra, at p.856." 251 GLR at pp. 117-18.

In dissent, Chief Justice Hill noted:

> Regarding the sufficiency of the evidence as to murder committed in the commission of an armed robbery and as to murder committed for the purpose of receiving money, the District Court, whether right or wrong, found the evidence as to both these aggravating circumstances to be insufficient ....
>
> The State appealed ... and the Circuit Court did not reverse the District Court's finding and conclusions as

> to the sufficiency of the evidence as to either aggravating circumstance.
>
> Under Bullington v. Missouri, 451. U.S. 430, 442-446 (101 S.C.1852, 68 L.E.2d 270) (1981), and Burks v. United States, 437 U.S.1 (98 S.C. 2141, 57 L.E.2d 1 (1978), double jeopardy prevents Young from being retried and sentenced to death for either of these aggravating circumstances regardless of our view of the sufficiency of the evidence to support those aggravating circumstances and notwithstanding the trial jury's findings that Young murdered Mr. Flynt while engaged in the commission of an armed robbery and that Young murdered Flynt for the purpose of receiving money. Jackson v. Virginia, 443 U.S. 307 (99 S.Ct. 2781, 61 L.E.2d 560) (1979).
>
> ...Thus, I am forced to conclude that Young cannot be resentenced to death. Godfrey v. State, 248 Ga. 616, 625 (dissenting opinion by Hill, P.J.) (284 S.E.2d 422) (1981), cert. denied 456 U.S. 919 (1982). 251 GLR 120-21.

Petitioner seeks review in this court of the majority opinion and judgment of the Supreme Court of Georgia described above.

ARGUMENT

A. Applicable Law

I. The Double Jeopardy Clause forbids the imposition of the death penalty in this case under O.C.G.A. §§17-10-30(b)(2) and (4), because of the federal district court's ruling that the evidence presented at petitioner's first trial was not sufficient to support a finding of either aggravating circumstance beyond a reasonable doubt.

In Bullington v. Missouri, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981), this Court held that the Double Jeopardy

Clause applied to a sentencing hearing conducted pursuant to Missouri's death penalty statute, because of the similarities in procedure between such a hearing and a trial on the issue of guilt or innocence.

Georgia's death penalty statute is "essentially identical" to the Missouri statute, according to the Supreme Court of Georgia. Godfrey v. State, 248 Ga. 616, 617 (1981). A hearing is held before the same jury which found the defendant guilty, or before the court if a jury trial is waived. The prosecution bears the burden of proving at least one statutory aggravating circumstance beyond a reasonable doubt. O.C.G.A. §17-10-30.

In Bullington v. Missouri, supra, the defendant had been sentenced to life imprisonment at his first trial. In this case, Charlie Young was sentenced to death. However, in reviewing the validity of that sentence in an action under 28 U.S.C. §2254, the Federal District Court for the Middle District of Georgia held that the evidence presented at petitioner's sentencing hearing "... was not legally sufficient to support the jury's finding beyond a reasonable doubt ..." that the aggravating circumstances existed. See Jackson v. Virginia, 443. U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

The rule of Bullington must apply to this situation by logical extension, because it was implicit in the district court's ruling that no rational jury could have found beyond a reasonable doubt that aggravating circumstances existed. As this Court said in Burks v. United States, 437 U.S.1, 16, 98 S.Ct. 2141, 57 L.Ed.2d 2141 (1978):

> In holding the evidence insufficient to sustain guilt, an appellate court determines that the prosecution has failed to prove guilt beyond a reasonable doubt .... Moreover, such an appellate reversal means that the government's case was so lacking that it should not have even been submitted to the jury. Since we necessarily

> afford absolute finality to a jury's verdict of aquittal - no matter how erroneous its decision - it is difficult to conceive how society has any greater interest in retrying a defendant when, on review, it is decided as a matter of law that the jury could not properly have returned a verdict of guilty.

II. The Double Jeopardy Clause forbids the imposition of the death penalty in this case under O.C.G.A. §17-10-30(b)(7).

After the decisions in Young v. Zant, 506 F.Supp. 274 (M.D. Ga. 1980) and Young v. Zant, 677 F.2d 792 (11th Cir. 1982), petitioner was reindicted, and his counsel was served with a new "Notice of Statutory Aggravating Circumstances," listing the same two aggravating circumstances relied upon at his first sentencing hearing, and adding the aggravating circumstance referred to above. See Appendix, page A-29.

This third aggravating circumstance must stand upon the same footing as the other two, notwithstanding the fact that it was not submitted to the jury at petitioner's first sentencing hearing. The prosecution, "... having been given one fair opportunity to offer whatever proof if can assemble ...," Burks v. United States, supra, 451 U.S. at p.15, should not be allowed to make repeated attempts to have petitioner sentenced to death.

> The Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding. This is central to the objective of the prohibition against successive trials. The Clause does not allow "the State ... to make repeated attempts to convict an individual for an alleged offense, " since "(t)he constitutional prohibition against 'double jeopardy' was designed to protect an individual from being subjected to the

hazards of trial and possible conviction more than once for the alleged offense." Burks v. United States, supra, 451 U.S. at p.11, citing Green v. United States, 355 U.S. 184, 187, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957).

This rule should apply with added force in the case at bar, since it is obvious from the nature of the "new" aggravating circumstance that the State knew, or reasonably should have known, prior to petitioner's first trial and sentencing hearing, if any "torture, depravity of mind, or an aggravated battery" were involved. There were no witnesses to the actual altercation leading to the victim's death other than the petitioner and the victim. Evidence of "torture, depravity of mind, or an aggravated battery" necessarily must be supplied by scientific reconstruction and autopsy, done long ago. There is therefore reason to worry if "... the State with all its resources and power ... (is) ... allowed to make repeated attempts to convict ...," Green v. United States, supra, 355 U.S. at pp.187-188, that petitioner will again be sentenced to death on the basis of an aggravating circumstance that does not exist.

III. The Supreme Court of Georgia misinterpreted and misapplied the decision of the United States Court of Appeals in Young v. Zant, 677 F.2d 792 (11th Cir. 1982).

The Supreme Court of Georgia avoided all of the problems outlined above simply by finding that the Court of Appeals had "reversed" the district court's ruling that the evidence did not support the jury's findings of aggravating circumstances. Young v. State, 251 Ga. 153, 251 GLR 114, 115-116. While the Georgia Supreme Court's "interpretation" of the court of appeals' ruling was a clever device for avoiding the underlying issues, it is in conflict with settled law, and should not be viewed as substantial grounds supporting the majority opinion and judgment below.

The opinion of the United States Court of Appeals in

this case refers with approval to the district court's ruling setting aside the death penalty. See 677 F.2d at pp. 794 n.3, 799. The court of appeals' judgment provided:

> The district court's denial of the writ of habeas corpus with respect to the guilt phase of Charlie Young's trial is therefore REVERSED. 677 F.2d. at p.800 (emphasis supplied).

In a proper case where the error relates only to "separable issues" covered by the judgment, it may be reversed as to those issues without reversing the judgment in its entirety. The unaffected parts must be deemed a final judgment of the facts and rights which they determine. See, generally, 5 Am. Jur. 2d §953 and cases cited therein; 5B C.J.S. §1915 and cases cited therein. McKay v. McKay, 93 Ga.App. 42(3), 90 S.E.2d 627 (1955), and similar cases cited by the Supreme Court of Georgia in support of its ruling, are all distinguishable from this case, because in none of them were the issues "separable" as they clearly are in this case, and all involved a general reversal of a judgment.

The conclusion of the Supreme Court of Georgia that Jackson v. Virginia, 443, U.S. 307, 99 S.Ct. 2781, 61 L.Ed. 2d 560 (1979) was "... not relied upon by either the district court of the court of appeals," 251 GLR at p.117, is simply not correct. A federal district court's authority to order relief under 28 U.S.C. §2254 is limited to cases in which there has been a "violation of the Constitution or laws or treaties of the United States." 28 U.S.C. §2254(a). This authority does not extend to set aside a finding in a state court on the ground that it was against the "weight" of the evidence. Prior to Jackson v. Virginia, supra, a "no evidence" standard was generally applied by federal courts in determining constitutional sufficiency of evidence to support a finding. See, e.g., Thompson v. Louisville, 362 U.S. 199, 80 S.Ct. 624, 4 L.Ed.2d 645.

The standard under Jackson is, of course, whether a "rational trier of the facts" could have found a fact beyond a reasonable doubt. Jackson v. Virginia, supra, at 443. U.S. at p.324. The Georgia Supreme Court's "conclusion" that the federal court's observations in this case "... related to the weight of the evidence rather than constitutional sufficiency," 251 GLR at p.117 (Emphasis original), therefore ascribes a power to the federal courts which does not exist, and which the State of Georgia would probably consider grounds for secession from the Union if it did exist.

The majority opinion of the Supreme Court of Georgia should therefore be viewed as exactly what it is: a clever, result-oriented avoidance of the "double jeopardy" issues in this case. Moreover, the court's opinion is reflective of its continuing hostility to this Court's decision in Bullington v. Missouri, supra. See, e.g., Zant v. Redd, 249 Ga. 211 (1982), holding that the doctrine of Bullington v. Missouri "does not apply" to aggravating circumstances. Cf. Godfrey v. State, 248 Ga. 616, 617 (1981) (Georgia's death penalty statute "identical" to Missouri's death penalty statute involved in Bullington).

B. Reasons for Granting the Writ.

1. Petitioner has no remedy remaining if this Court declines to review his case or to enter a summary reversal, which will preserve his rights under the Double Jeopardy Clause. As this Court noted in Abney v. United States, 431 U.S.651, at pp.660-662:

> (T)he right conferred on a criminal accused by the Double Jeopardy Clause would be significantly undermined if appellate review of double jeopardy claims were postponed until after conviction and sentence. To be sure, the Double Jeopardy Clause protects an individual against being twice convicted for the same crime, and that aspect of the right can be fully vindicated on an appeal following final judgment as the government suggests. However,

> this Court has long recognized that the Double Jeopardy Clause protects an individual against more than being subjected to double punishments. It is a guarantee against being twice put to trial for the same offense .... Because of this focus on the "risk" of conviction, the guarantee against double jeopardy assures an individual that, among other things, he will not be forced, with certain exceptions, to endure the personal strain, public embarrassment, and expense of a criminal trial more than once for the same offense. It thus protects interests wholly unrelated to the propriety of any subsequent conviction .... Obviously these aspects of the guarantee's protections would be lost if the accused were forced to "run the gauntlet" a second time before an appeal could be taken; even if the accused is acquitted, or, if convicted, has his conviction ultimately reversed on double jeopardy grounds, he has still been forced to endure a trial that the Double Jeopardy Clause was designed to prohibit. Consequently, if a criminal defendant is to avoid exposure to double jeopardy and thereby enjoy the full protection of the clause, his double jeopardy challenge to the indictment must be reviewable before the subsequent exposure occurs. (Emphasis original).

Petitioner has exhausted his State remedies on the issues raised by this petition. He cannot seek immediate review by petition for writ of habeas corpus under 28 U.S.C. §2254, because he is not, at this point, in custody pursuant to a conviction of a state court. See, 28 U.S.C. §§2241(c)(3) and 2254(a) and Rule 1(a) of the §2254 Rules. Also see, Wilkes, Federal and State Postconviction Remedies and Relief, §§8-[illegible] and 8-14, The Harrison Company, 1983. The federal district court will therefore probably not have jurisdiction to entertain petitioner's "double jeopardy" claims until he has been resentenced in violation of his rights.

2. The decision of the Supreme Court of Georgia is in conflict with these decisions of other state courts of last resort:

State v. Silhan, 302 N.C. 223, 267-71, 275 S.E.2d 450, 480-83 (1981) (On resentencing, State cannot use an aggravating circumstance if there was insufficient evidence to support it at first hearing or jury failed to find its existence at first hearing).

Ex Parte Augusta, 639 S.W.2d 481 (Tex.Cr.App. 982) (State precluded from "relitigating an issue of fact at a ... second punishment hearing where it failed to properly litigate the factual issue at the first ... punishment hearing.")

3. The decisions of the state courts of last resort on the questions raised in this petition are inconsistent, and in some cases are inconsistent with Bullington v. Missouri, supra. The following decisions are generally consistent with the decision of the Supreme Court of Georgia in this case:

State v. Gretzler, 659 P.2d 1, 7-8 (Ariz. 1983) (Finding of two additional aggravating circumstances at second sentencing hearing not violative of Double Jeopardy Clause because there was no "implied acquittal" at first hearing).

State v. Gilbert, 283 S.E.2d 179 (S.C. 1981) (Aggravating circumstance may be resubmitted at second sentencing hearing even if submitted at first hearing, if jury did not specifically find "for" or "against" it).

Zant v. Redd, 249 Ga. 211 (1982) (same as State v. Gilbert, supra).

4. The decision of the Supreme Court of Georgia is in conflict with the following decisions of this court:

Bullington v. Missouri, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981).

Burks v. United States, 437 U.S.1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978).

Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

The decision of the Supreme Court of Georgia involves an important question of federal constitutional law, which has not been settled by this court, although there is dictum in Bullington v. Missouri, supra, which is on point. See, 451 U.S. at pp. 442-443. ("Clean slate" rule allowing retrial if conviction reversed for trial error not applicable "whenever a jury agrees or an appellate court decides that the prosecution has not proved the case.") (Emphasis supplied).

CONCLUSION

For all the reasons set out above, petitioner respectfully requests that the Court take jurisdiction of this case and issue a Writ of Certiorari to the Supreme Court of Georgia.

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39669. YOUNG v. THE STATE.
251 Ga. 153

WELTNER, Justice.

Young was convicted in the Superior Court of Greene County of murder, armed robbery and robbery by intimidation. He was sentenced to death for the murder, the jury having found two aggravating circumstances: that the offense of murder was committed while the offender was engaged in the commission of another capital felony, armed robbery (OCGA § 17-10-30 (b) (2) (Code Ann. § 27-2534.1)), and that the offender committed the offense of murder for the purpose

of receiving money (OCGA § 17-10-30 (b) (4) (Code Ann. § 27-2534.1)). In addition, Young received a life sentence for armed robbery and 20 years for robbery by intimidation. This Court affirmed in *Young v. State*, 237 Ga. 852 (230 SE2d 287) (1976). Young's subsequent petition for a writ of habeas corpus filed in state court was denied, and this Court affirmed. *Young v. Ricketts*, 242 Ga. 559 (250 SE2d 404) (1978), *cert. denied*, 442 U. S. 934 (99 SC 2870, 61 LE2d 304) (1979).

Young then initiated a habeas corpus proceeding in the United States District Court for the Middle District of Georgia. The district court set aside the death sentence, ruling that Young received ineffective assistance of counsel during the sentencing phase of his trial. Young v. Zant, 506 FSupp. 274 (M.D. Ga. 1980). As an additional ground for its holding, the court stated that ". . . the evidence was not legally sufficient to support the jury's finding beyond a reasonable doubt that the murder was committed *in the course of* an armed robbery or *for the purpose of* obtaining money." Id. at p. 280.

Thus, the court held that the evidence was not legally sufficient to support the jury's finding of the aggravating circumstances defined at OCGA § 17-10-30 (b) (2) and (b) (4) (Code Ann. § 27-2534.1).

The United States Court of Appeals for the Eleventh Circuit reversed, holding that Young did not receive effective assistance of counsel at *either* stage of the bifurcated trial. Young v. Zant, 677 F2d 792 (11th Cir. 1982). Young's convictions were thus reversed, as well as his death sentence.

The court of appeals recognized that the district court had found, as an alternative ground for reversal of the death sentence, that the evidence was insufficient to support the finding of the two aggravating circumstances alleged by the State. "The district court concluded that the undisputed evidence showed that Young's victim, Reuben H. Flynt, was completely incapacitated before Young formed the intent to rob him. Thus, the court reasoned, the State had failed to prove that any of the essential elements of armed robbery, the taking of property from a person 'by use of an offensive weapon,' [OCGA § 16-8-41 (Code Ann. § 26-1902)], occurred prior to the assault, nor had it shown that Young's purpose in assaulting Flynt was to obtain money.

"Curiously, the district court did not discuss the legal effect of Flynt's incapacity, and therefore Young's taking *without* 'use of an offensive weapon,' on the validity of Young's conviction for armed robbery. This might have been due to petitioner's failure to make the claim that the State's evidence was insufficient under the standard set forth in *Jackson v. Virginia*, 443 U. S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)." 677 F2d, supra, at p. 794, n. 3.

The court of appeals, having based its decision solely on ineffectiveness of counsel, did not expressly affirm the holding of the district court with respect to the sufficiency of the evidence. However, in discussing the issue of ineffectiveness at the guilt-innocence stage of the trial, the court made this observation: "Turning to the armed robbery count, we note the district court, in assessing the sufficiency of the State's evidence of aggravating circumstances on the malice murder charge, concluded that the State did not produce sufficient evidence to permit the jury to find beyond a reasonable doubt that Young had formed the intent to rob Flynt prior to the fatal assault. *Young v. Zant*, 506 F. Supp. at 280-81. This deficiency in the evidence should have been sufficiently clear to [defense counsel] to suggest a

strong argument that Young did not rob Flynt by use of an offensive weapon and thus could not be guilty of armed robbery under [OCGA § 16-8-41 (Code Ann. § 26-1902)]." 677 F2d, supra, at p. 799.

The judgment of the court of appeals' opinion reads: "The district court's denial of the writ of habeas corpus with respect to the guilt phase of Charlie Young's trial is therefore REVERSED." 677 F2d, supra, at p. 800.

Young has been re-indicted in superior court for the same offenses — malice murder, armed robbery and robbery by intimidation. The State has once again announced its intention to seek the death penalty based upon the same aggravating circumstances, and with the possible addition of OCGA § 17-10-30 (b) (7) (Code Ann. § 27-2534.1). Young filed pleas of double jeopardy in opposition to the indictment for armed robbery and the attempt to seek the death penalty again. It is from the denial of these pleas in bar that Young now appeals.

1. We conclude that the holding of *Patterson v. State*, 248 Ga. 875 (287 SE2d 7) (1982), is applicable to this case. The denial of Young's double *jeopardy* pleas may be appealed without application and certification, which otherwise would be required under OCGA § 5-6-34 (b) (Code Ann. § 6-701).

2. Although the district court and court of appeals were in agreement as to the invalidity of Young's death sentence, we interpret the opinion of the court of appeals as a reversal of the district court. The court of appeals held that "[a]n examination of the record of the trial makes it plain that [defense counsel] did not accord Young even a modicum of professional assistance at any time." 677 F2d, supra, at pp. 794-5. Rather than reversing in part and affirming in part, the court of appeals chose to substitute its opinion for that of the district court.

We perceive that the effect of this reversal was to nullify the entire opinion of the district court and to place the parties in the position quo ante, subject, of course, to the holdings of the court of appeals. *Finney v. Tumlin*, 50 Ga. 140 (1873); *Digby v. Powell*, 15 Ga. 91 (1854); *Walker v. Dougherty*, 14 Ga. 653 (1854); *McKay v. McKay*, 93 Ga. App. 42 (3) (90 SE2d 627) (1955). See Gospel Army v. City of Los Angeles, 331 U. S. 543 (67 SC 1428, 91 LE 1662) (1947); Atlantic Coast Line R. Co. v. St. Joe Paper Co., 216 F2d 832 (5th Cir. 1954). It follows that in reviewing the denial of Young's double jeopardy pleas, we look only to the opinion of the court of appeals.

That court concluded that Young's convictions and sentences were invalid because Young did not receive reasonably effective legal assistance at either stage of his trial. "Where a prisoner obtains his freedom by writ of habeas corpus, because he was denied the right of counsel when originally convicted, he does not obtain a release exonerating him from the charges for which he was tried, but the effect of such release is to set aside any plea, verdict, sentence, etc., that may have been entered in the case and he may then be arraigned as though no prior trial, etc., had taken place." *Patton v. State*, 111 Ga. App. 853 (143 SE2d 518) (1965), headnote; see *Fair v. Balkcom*, 216 Ga. 721, 728-9 (119 SE2d 691) (1961), see Bullington v. Missouri, 451 U. S. 430 (101 SC 1852, 68 LE2d 270) (1981).

3. As noted, the court of appeals recognized the holding of the district court that the evidence was insufficient to show that Young formed the intent to rob his victim prior to the fatal assault, and concluded that "[t]his deficiency in the evidence should have been sufficiently clear to [defense counsel] to suggest a strong argument that Young did not rob Flynt by use of an offensive weapon and thus

could not be guilty of armed robbery under [OCGA § 16-8-41 (Code Ann. § 26-1902)]." 677 F2d, supra, at p. 799. Young contends that this constitutes a holding by the court of appeals that the evidence was insufficient to support aggravating circumstances (b) (2) and (b) (4) and the conviction of armed robbery. As is clear from our holding in Division 1, we do not agree. Nevertheless, were Young's contention correct, we observe that the court of appeals based its conclusions upon an inaccurate construction of state law, specifically, OCGA § 16-8-41 (Code Ann. § 26-1902), as Jackson v. Virginia, 443 U. S. 307 (99 SC 2781, 61 LE2d 560) (1979), which sets out the constitutional standard for review of the sufficiency of the evidence, was not relied on by either the district court or the court of appeals.

"A person commits the offense of armed robbery when, with intent to commit theft, he takes property of another from the person or immediate presence of another by use of an offensive weapon. . . ." OCGA § 16-8-41 (a) (Code Ann. § 26-1902). In *Moore v. State*, 233 Ga. 861, 864 (213 SE2d 829) (1975), the appellant contended that ". . . there was no aggravating circumstance in [the] case because a person cannot be guilty of armed robbery if the victim is not conscious or alive at the time of the robbery." Rejecting that argument, we said: "In *Hicks v. State*, 232 Ga. 393 (207 SE2d 30), we concluded that [§ 16-8-41] 'clearly contemplates that the offensive weapon be used as a concomitant to a taking which involves the use of actual force or intimidation (constructive force) against another person.' p. 403.

"This accords with the general rule in the United States that the force or intimidation essential to robbery must either precede or be contemporaneous with, and not subsequent to, the taking.

"Without the force used by appellant here, the taking from [the victim] could not have been accomplished. That [the victim] died from the force used either immediately, or subsequently to the taking, does not make the offense any less a robbery." Id.

Under the law of Georgia, therefore, the fact that Young's victim was incapacitated at the time of the taking cannot extricate his conduct from the definition of armed robbery in § 16-8-41 (a) (Code Ann. § 26-1902).

In *Moore*, supra, the defendant admitted that his purpose in going to the victim's house, where the fatal assault occurred, was to commit robbery. In the present case, the federal court appears to have concluded, based solely upon Young's statement, that Young did not intend to rob the victim at the time of the fatal assault. Absent a reliance upon Jackson v. Virginia, supra, in support of that determination, we conclude that the court's observations related to the weight of the evidence rather than constitutional sufficiency.

The evidence of intent to rob at the time of the shooting in this case clearly is sufficient under the very holding in Jackson v. Virginia. There, the United States Supreme Court stated: "From the circumstantial evidence in the record, it is clear that the trial judge could reasonably have found beyond a reasonable doubt that the petitioner did possess the necessary intent at or before the time of the killing." 443 U. S. supra, at pp. 324-5. This determination was made in spite of Jackson's own statement to the contrary.

The ruling in Jackson is consistent with Georgia cases which hold that the element of malice may be implied from the circumstances surrounding the

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homicide. *Holt v. State*, 247 Ga. 648, 649 (278 SE2d 390) (1981) and cits. The jury is entitled to reject the defendant's statement in favor of such circumstantial evidence.

We therefore adhere to our former ruling that "[a] review of the evidence adduced by the state in this case shows that it is legally sufficient to support the finding by the jury of ... aggravating circumstances [(b) (2) and (b) (4)]." *Young v. State*, supra, at p. 856.

It will be seen that such a standard for the assessment of evidence is a manifest necessity to the supervision of any orderly and sensible system of criminal justice. Without it, courts would be bound inextricably to whatever version a defendant might offer. Thus, a bank robber apprehended in a circle of dead bodies would be entitled, as a matter of law, to acquittal upon his testimony that multiple homicide was reasonably necessary to protect himself from a continued felonious assault upon him by bank personnel. Or, every domestic killing would result in acquittal upon the surviving partner's testimony that the deceased launched attack with a butcher knife. Or, every burglar would be set free upon his statement that his entry into the dwelling of another at midnight was without intent to commit a felony or theft.

Judgment affirmed. All the Justices concur, except Hill, C. J., who concurs in part and dissents in part.

DECIDED MAY 25, 1983 —
REHEARING DENIED JULY 7, 1983.

Murder, etc. Greene Superior Court. Before Judge Duke.

Donald W. Huskins, James A. Nolan, for appellant.

Joseph H. Briley, District Attorney, Norman R. Miller, Assistant District Attorney, Michael J. Bowers, Attorney General, for appellee.

HILL, Chief Justice, concurring in part and dissenting in part.

At Young's trial, the state introduced evidence from which the jury was authorized to find the following facts: Mr. Reuben Flynt, vice president of the Farmer's Bank in Union Point, Georgia, was shot and killed in his home on December 15, 1975. At approximately 11:30 a.m. December 15, Young and his nephew drove from Atlanta to Union Point (a distance of about 75 miles). Young was carrying a .22 caliber pistol. Arriving in Union Point, Young and his nephew drove to the Farmer's Bank looking for Mr. Flynt's car, then to Mr. Flynt's home, returned to the bank, and then returned to Mr. Flynt's home where they saw Flynt's car.

Young entered Flynt's home, shot him four times at close range, removed Flynt's billfold from his rear pocket, and hit the victim several times with the pistol.

Young and his nephew then returned to the bank where Young sent the nephew inside with the victim's wallet. The nephew said: "The man that gave me this billfold said for you to give me $60,000 or he will kill Reuben Flynt in 15 minutes." The nephew was given about $10,000, and police arrested him as he was leaving the bank. Young fled.

When Young was arrested, the .22 pistol was found in the car. Ballistics evidence showed that pistol to be the murder weapon. The victim died from loss of blood.

The jury was authorized not to believe the following self-serving statements made by Young: That Young went to the victim's home to discuss overdue bank

loans; that Young did not carry the pistol with him when he first went to the victim's door; that Young and the victim argued over the unpaid loans; and that the idea to get money from the bank did not occur to Young until after the victim had been shot.

The jury found Young guilty of murder, armed robbery and robbery by intimidation, and it imposed the death penalty for the murder based on two statutory aggravating circumstances, that the murder was committed while the offender was engaged in the commission of an armed robbery, OCGA § 17-10-30 (b) (2) (formerly Ga. Code Ann. § 27-2534.1 (b) (2)), and that the offender committed the murder for the purpose of receiving money, OCGA § 17-10-30 (b) (4) (formerly Ga. Code Ann. § 27-2534.1 (b) (4)).

After his convictions and death sentence were affirmed by this court, *Young v. State*, 237 Ga. 852 (230 SE2d 287) (1976), and the denial of his petition for habeas corpus was affirmed, *Young v. Ricketts*, 242 Ga. 559 (250 SE2d 404) (1978), cert. denied sub nom. *Young v. Zant*, 442 U. S. 934 (1979), Young sought habeas relief in the federal district court urging, among other grounds, that his trial counsel rendered ineffective assistance and that the evidence did not support the statutory aggravating circumstances. The district court found the evidence insufficient to support those aggravating circumstances and vacated the death penalty for that reason as well as for ineffective assistance of counsel during the sentencing phase of trial. *Young v. Zant*, 506 FSupp. 274, 280-281 (M.D. Ga. 1980).

Young and the state appealed. The circuit court in its opinion dealt with the question of ineffective assistance of counsel. The circuit court noted the district court's finding that the evidence as to armed robbery was insufficient to support the first aggravating circumstance and said: "This deficiency in the evidence should have been sufficiently clear to [defense counsel] to suggest a strong argument that Young did not rob Flynt by use of an offensive weapon and thus could not be guilty of armed robbery. ..." *Young v. Zant*, 677 F2d 792, 799 (11th Cir. 1982). The circuit court granted habeas relief as to the guilt phase of Young's trial based on ineffective assistance of counsel.

Based on the foregoing, Young contends first that double jeopardy prevents his being retried for armed robbery and robbery by intimidation, and he argues next that double jeopardy prevents the state from seeking the death penalty on the two statutory aggravating circumstances referred to above. Young argues that the evidence as to the crimes of armed robbery and robbery by intimidation has been found to be insufficient and hence that retrial on those charges is barred, as is the imposition of the death penalty based on the corresponding aggravating circumstances. I will deal first with the crimes themselves and then with the aggravating circumstances. Regarding the crime of robbery by intimidation, the evidence is undisputed that Young and his accomplice drove from the murder victim's home to the bank, that the accomplice presented the victim's wallet to a teller and said "The man that gave me this billfold said for you to give me $60,000 or he will kill [the victim] in fifteen minutes," that the accomplice received about $10,000, and that the idea for this crime was Young's.

OCGA § 16-8-40 (formerly Ga. Code Ann. § 26-1901) provides: "(a) A person commits the offense of robbery when, with intent to commit theft, he takes property of another from the person or the immediate presence of another ... (2) By intimidation, by the use of threat or coercion, or by placing such person in fear of,

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immediate serious bodily injury to himself or to another . . . ." The evidence in this case is sufficient to prove robbery by intimidation and neither the district court nor the circuit court of appeals has found to the contrary. The district court found only that Young did not contemplate taking money from the bank until after the shots had been fired and the blows struck, Young v. Zant, supra, 506 FSupp. at 286, and thus that the evidence as to the second aggravating circumstance — murder for the purpose of receiving money — was insufficient. The court below did not err in overruling Young's plea of double jeopardy as to the crime of robbery by intimidation.

Regarding the crime of armed robbery, the evidence shows that Young drove from Atlanta to Union Point, Georgia, taking a .22 caliber pistol with him, that Young shot the victim four times at close range, and that Young then took the victim's billfold from his rear pocket and then hit the victim, who was still alive, with the pistol.

OCGA § 16-8-41 (a) (formerly Ga. Code Ann. § 26-1902) provides: "A person commits the offense of armed robbery when, with intent to commit theft, he takes property of another from the person or the immediate presence of another by use of an offensive weapon . . . ." The jury was authorized to find Young guilty of armed robbery regardless of when the intent to take the victim's billfold arose, regardless of whether the victim was incapacitated and even if the victim had been killed instantly. See *Moore v. State*, 233 Ga. 861 (2b) (213 SE2d 829) (1975), cert. denied, 428 U. S. 910 (1976). A person is guilty of armed robbery under OCGA § 16-8-41 (a) (Code Ann. § 26-1902), supra, when the victim is shot before the taking as well as when the victim is shot after the taking, or is not shot at all. See *Moore v. State*, supra.

In my view, the evidence is sufficient to prove armed robbery in this case and neither the district court nor the circuit court of appeals has found to the contrary. That issue was not before either court. See Young v. Zant, supra, 677 F2d at 799, n. 12. The district court found that the jury could only speculate that Young intended to rob the victim before committing the murder, Young v. Zant, supra, 506 FSupp. at 280-281, and thus that the evidence as to the first aggravating circumstance — murder committed *in the course* of an armed robbery — was insufficient (emphasis in the district court opinion, Young v. Zant, supra, 506 FSupp. at 280).

As for the armed robbery, the circuit court merely observed that Young's attorney could have made an "argument that Young did not rob [the victim] by use of an offensive weapon and thus could not be guilty of armed robbery. . . ." Young v. Zant, supra, 677 F2d at 799. That a lawyer was ineffective because he could have made an argument is not a finding that the evidence was insufficient. The court below did not err in overruling Young's plea of double jeopardy as to the crime of armed robbery.

Regarding the sufficiency of the evidence as to murder committed in the commission of an armed robbery and as to murder committed for the purpose of receiving money, the district court, whether right or wrong, found the evidence as to both these aggravating circumstances to be insufficient. Young v. Zant, supra, 506 FSupp. at 280-281.

The state appealed, Young v. Zant, supra, 677 F2d at 794, and the circuit court did not reverse the district court's finding and conclusions as to the sufficiency of

the evidence as to either aggravating circumstance.

Under Bullington v. Missouri, 451 U. S. 430, 442-446 (101 SC 1852, 68 LE2d 270) (1981), and Burks v. United States, 437 U. S. 1 (98 SC 2141, 57 LE2d 1) (1978), double jeopardy prevents Young from being retried and sentenced to death for either of these aggravating circumstances regardless of our view of the sufficiency of the evidence to support those aggravating circumstances and notwithstanding the trial jury's findings that Young murdered Mr. Flynt while engaged in the commission of an armed robbery and that Young murdered Flynt for the purpose of receiving money. Jackson v. Virginia, 443 U. S. 307 (99 SC 2781, 61 LE2d 560) (1979).

I therefore concur in the majority opinion insofar as it affirms the overruling of Young's plea of double jeopardy as to the crimes of armed robbery and robbery by intimidation, but I am bound to dissent insofar as the majority affirms the overruling of Young's plea of double jeopardy as to the two aggravating circumstances. Thus, I am forced to conclude that Young cannot be resentenced to death. *Godfrey v. State*, 248 Ga. 616, 625 (dissenting opinion by Hill, P. J.) (284 SE2d 422) (1981), cert. denied 456 U. S. 919 (1982).

39675. BLOCK v. VOYAGER LIFE INSURANCE COMPANY.
251 Ga. 162

CLARKE, Justice.

We granted certiorari to determine whether under the Civil Practice Act, OCGA Title 9, Chapter 11 (Code Ann. Title 81A), the pleadings may be amended to substitute a named party plaintiff when suit is filed in the name of a party which is not a legal entity. The Court of Appeals answered this question in the negative based upon holdings of this court prior to the adoption of the Civil Practice Act, and a line of cases following those decisions. *Voyager Life Ins. Co. v. Estate of Frank G. Bagley*, 165 Ga. App. 212 (299 SE2d 118) (1983). We now reverse and hold that such amendments are proper.

1. This appeal is a consolidation of two cases brought after the death of Frank G. Bagley to recover the proceeds of two credit life insurance policies issued to him by Voyager Life Insurance Company (hereinafter Voyager), the appellee. The suits were brought in the name of "Estate of Frank G. Bagley" as plaintiff. Voyager did not raise the issue of whether this denomination was a legal entity. The case proceeded and the trial court granted summary judgment to the plaintiff and Voyager appealed attacking the merits of the judgment. In reversing the judgment the Court of Appeals relied principally upon the language in *Orange County Trust Co. v. Estate of Takowsky*, 119 Ga. App. 366, 367 (166 SE2d 913) (1969), that "An estate is not a legal entity which can be a party plaintiff to legal proceedings. . . ." Such a suit "'. . . *is a mere nullity, and therefore, with no party plaintiff, there is no case in court, and consequently nothing to amend by.*'" (Emphasis supplied.) *Smith v. Commissioners &c. of Glynn County*, 198 Ga. 322, 323 (31 SE2d 648) (1944), and cases there cited. As pointed out in the concurring opinion in the Court of Appeals, amendments to change the name of a party are permitted so long as the original party designation describes a person, firm or corporation. *See Powell v. Ferguson Tile &c. Co.*, 125 Ga. App. 683 (188 SE2d 901) (1972), a suit brought in the trade name of a company may be amended to substitute the

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SUPREME COURT OF GEORGIA

ATLANTA, July 7, 1983

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

Charlie Young v. The State

Upon consideration of the Motion for Rehearing filed in this case, it is ordered that it be hereby denied.

All the Justices concur except Hill, C.J., dissents.

SUPREME COURT OF THE STATE OF GEORGIA,

CLERK'S OFFICE, ATLANTA,

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Hazel E. Thelford, Deputy Clerk.

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31359. YOUNG v. THE STATE.

INGRAM, Justice.

Appellant, Charlie Young, was convicted of murder, armed robbery and robbery by intimidation in the Greene County Superior Court following his indictment by a grand jury in that county. Appellant was sentenced to death for the murder conviction. He also received a sentence of life imprisonment for the armed robbery conviction and 20 years imprisonment for the robbery by intimidation conviction. Appellant's case is before this court on appeal and for mandatory review of the death sentence imposed in the trial court.

The state introduced evidence from which the jury was authorized to find the following facts: On December 15, 1975, Reuben H. Flynt, Vice-president of the Farmer's Bank in Union Point, Georgia, was killed. At approximately 12:30 p.m. that day, and approximately one hour later that day, a neighbor of Mr. Flynt's observed a green Buick pull into the victim's driveway and leave. A vehicle of similar description occupied by at least one black male was later observed near the Farmer's Bank.

Appellant later gave the following statement to police and FBI agents, after being apprised of his constitutional rights. At approximately 11 a.m., December 15, 1975, appellant and his nephew, Derwin Young, drove from Atlanta to Union Point, Georgia. Appellant was carrying a .22 caliber pistol in a paper bag in the car. Upon arriving in Union Point, appellant drove to the Farmer's Bank and then to Reuben Flynt's house, then back to the bank and to Reuben Flynt's house again before locating Mr. Flynt's car. Appellant then stopped at Mr. Flynt's house and went into the house while Derwin Young remained in the car. Appellant stated that his purpose in visiting Mr. Flynt was to discuss notices he had received from the bank concerning delinquencies in his payment of loans from the bank.

Appellant went to the door and rang the doorbell but was rebuffed by Flynt who told him to come see him at the bank in 30 minutes. Appellant stated that he then returned to the car, got the .22 caliber pistol, and walked inside the Flynt house where he asked to use the telephone to call his grandmother. After trying unsuccessfully to reach his grandmother, appellant Young again tried to talk with Flynt concerning the outstanding loans. Words were exchanged and an argument ensued. Young recalled that he struggled with Flynt, hit him at least once, and fired several times at close range. Then, appellant ripped the telephone from the wall, removed Flynt's billfold from his rear pocket, and hit him again several times with the gun and possibly another object. Appellant states that it was at this point that he got the idea of getting money from the bank. After being apprehended later, appellant stated that he thought he had killed Flynt.

Appellant and his nephew, Derwin Young, then drove to the bank. Appellant told Derwin Young to go into the bank and give Mr. Stewart (president of the Farmer's Bank) Flynt's wallet and get $60,000 from the bank. A teller at the Farmer's Bank testified that on December 15, 1975, a young black male entered the bank, handed her a billfold and said, "The man that gave me this billfold said for you to give me $60,000 or he will kill Reuben Flynt in 15 minutes." The bank president, Mr. Stewart, ordered that the money be released. Derwin Young was arrested by the Greensboro Chief of Police Carlton Lewis upon leaving the bank as the police were alerted while he was there. Derwin Young was identified at trial with the use of photographs taken of him from hidden cameras in the bank.

Appellant fled to his grandmother's house and was later arrested there. A .22 caliber pistol was discovered beneath the driver's seat of the car driven by him. Mr. Flynt was found dead at his home. He had suffered four gunshot wounds. The bullets removed from the victim were fired from the .22 caliber pistol found in the car driven by appellant. The victim also had two deep lacerations across his forehead, as well as lacerations on the left side of his chin and in the back of the scalp, which showed the victim had been hit several times with the butt of the gun. The victim apparently survived for some period after infliction of the wounds, but finally died from a loss of blood.

In his first enumeration of error, appellant contends that the trial court erred in refusing to grant a continuance for the presentation of appellant's challenge to the array of the grand and traverse juries. Appellant had filed the challenge to the array on January 19, 1976, in which he contended that the grand and traverse juries did not constitute a representative cross section of the community. Appellant was indicted on January 26, at which time counsel for appellant was given notice of a hearing on the motion scheduled for January 29. It was on this later date that appellant's motion to continue the hearing on the challenge to the array was denied by the trial judge.

Counsel for appellant presented no evidence in

support of the challenge to the array but did make an offer of proof as to what action he would have taken if he were given more time to prepare his presentation of the challenge. Appellant's co-counsel testified that various illnesses had kept him from work for a period of time and he contended this illness, plus the short notice of the hearing, justified a continuance. A motion for continuance is addressed to the sound discretion of the trial court and the refusal to grant a continuance will not be disturbed unless there is a clear abuse of discretion. We find none here. Code Ann. § 81-1419. See *Smith v. State*, 235 Ga. 620, 621 (221 SE2d 41) (1975); *Jackson v. Hopper*, 232 Ga. 419, 420 (207 SE2d 58) (1974); and *Campbell v. State*, 231 Ga. 69 (2) (200 SE2d 690) (1973).

In enumeration of error No. 2, appellant contends that the trial court erred in denying his motion for change of venue based on prejudicial pre-trial publicity. Under the law of this state, the test concerning prejudicial pre-trial publicity is whether the jurors summoned to try the case have formed fixed opinions as to the guilt or innocence of the defendant from their exposure to pre-trial publicity. The newspaper articles on which appellant relied to show prejudice were not inflammatory and appellant presented no evidence of fixed opinions on the part of the traverse jurors as to his guilt or innocence. See *Street v. State*, 237 Ga. 307 (227 SE2d 750) (1976); *Coleman v. State*, 237 Ga. 84 (226 SE2d 911) (1976); *Dobbs v. State*, 236 Ga. 427 (224 SE2d 3) (1976); *Chenault v. State*, 234 Ga. 216 (215 SE2d 223) (1975); and *Krist v. Caldwell*, 230 Ga. 536 (198 SE2d 161) (1973). The grant or denial of motion for a change of venue in criminal cases lies largely within the discretion of the trial judge. The exercise of that discretion will not be reversed on appeal unless it is made to appear that there has been an abuse of that discretion. See *Street v. State*, supra; *Jarrell v. State*, 234 Ga. 410 (216 SE2d 258) (1975); and *Anderson v. State*, 222 Ga. 561 (150 SE2d 638) (1966). We find no abuse of discretion in this case. Code Ann. § 27-1101.

Applicable decisions of the United States Supreme Court on this issue were examined in detail in *Street v. State*, supra. We concluded in *Street* that under those decisions the defendant must show (1) that the setting of

the trial was inherently prejudicial, or (2) that the jury selection process showed actual prejudice to a degree that rendered a fair trial impossible. We find no showing of this kind in the present case.

In enumeration of error No. 3, appellant argues that the trial court erred in denying his motion to declare the Georgia Capital Punishment Statute unconstitutional. This contention has been considered by this court and the Supreme Court of the United States and both have upheld the constitutionality of the Georgia statute. *Coley v. State*, 231 Ga. 829 (204 SE2d 612) (1974); Gregg v. Georgia, — U. S. — (96 SC 2909, 49 LE2d 859) (1976).

Finally, appellant contends that the aggravating circumstances under Code Ann. § 27-2534.1 (b) (2) and (4) were not proved beyond a reasonable doubt. This enumeration of error will be considered in the sentence review. Code Ann. § 27-2537 (c) (2). We have reviewed the death sentence imposed in this case and conclude that it was not imposed under the influence of "passion, prejudice, or any other arbitrary factor." Code Ann. § 27-2537 (c) (1).

This court must also answer two additional questions before imposition of the death penalty can be affirmed: First, does the evidence support the jury's finding of statutory aggravating circumstances contained in § 27-2534.1 (b) (2), that is, was the offense of . . . murder . . . committed while the offender was engaged in the commission of another capital felony — and as provided in § 27-2534.1 (b) (4), did the offender commit the offense of murder for himself or another, for the purpose of securing money or any other thing of monetary value? A review of the evidence adduced by the state in this case shows that it is legally sufficient to support the finding by the jury of the presence of these aggravating circumstances.

The second question we must answer is whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and defendant. Code Ann. § 27-2537 (b) (3). We conclude that appellant Charles Young's death sentence for murder is neither excessive nor disproportionate to the penalty imposed in similar cases considering both the crime and the defendant. A list of similar cases is

appended to this opinion.

Judgment affirmed. All the Justices concur, except Gunter, J., who dissents.

ARGUED SEPTEMBER 13, 1976 — DECIDED NOVEMBER 2, 1976.

Murder, etc. Greene Superior Court. Before Judge Duke.

Reuben A. Garland, Frank Joseph Petrella, for appellant.

Joseph Briley, District Attorney, Arthur K. Bolton, Attorney General, Kirby G. Atkinson, Assistant Attorney General, for appellee.

APPENDIX.

Similar cases considered by the court: *Pass v. State,* 227 Ga. 730 (182 SE2d 779) (1971); *Howard v. State,* 231 Ga. 186 (200 SE2d 755) (1973); *Morgan v. State,* 231 Ga. 280 (201 SE2d 468) (1973); *Morgan v. State,* 233 Ga. 360 (211 SE2d 285) (1974); *House v. State,* 232 Ga. 140 (205 SE2d 217) (1974); *McCorquodale v. State,* 233 Ga. 369 (211 SE2d 577) (1974); *Moore v. State,* 233 Ga. 861 (213 SE2d 829) (1975); *Floyd v. State,* 233 Ga. 280 (210 SE2d 810) (1974); *Stack v. State,* 234 Ga. 19 (214 SE2d 514) (1975); *Owens v. State,* 233 Ga. 869 (214 SE2d 173) (1975); *Prevatte v. State,* 233 Ga. 929 (214 SE2d 365) (1975); *Jarrell v. State,* 234 Ga. 410 (216 SE2d 258) (1975); *Chenault v. State,* 234 Ga. 216 (215 SE2d 233) (1975); *Berryhill v. State,* 235 Ga. 549 (221 SE2d 185) (1975); *Smith v. State,* 236 Ga. 12 (222 SE2d 308) (1976); *Mason v. State,* 236 Ga. 46 (222 SE2d 339) (1976); *Coleman v. State,* 237 Ga. 84 (226 SE2d 911) (1976); *Pulliam v. State,* 236 Ga. 460 (224 SE2d 8) (1976); *Davis v. State,* 236 Ga. 804 (225 SE2d 241) (1976); *Birt v. State,* 236 Ga. 815 (225 SE2d 248) (1976); *Gibson v. State,* 236 Ga. 874 (226 SE2d 63) (1976); *Stephens v. State,* 237 Ga. 259 (227 SE2d 261) (1976); *Isaacs v. State,* 237 Ga. 105 (226 SE2d 922) (1976); *Banks v. State,* 237 Ga. 325 (227 SE2d 380) (1976); *Dungee v. State,* 237 Ga. 218 (227 SE2d 746) (1976).

Charlie YOUNG, Jr., Petitioner,

v.

Walter ZANT, Warden, Georgia Diagnostic & Classification Center, Respondent.

Civ. A. No. 79-100-Ath.

United States District Court, M. D. Georgia, Athens Division.

Dec. 5, 1980.

Georgia prisoner sought federal habeas corpus relief. The District Court, Wilbur D. Owens, Jr., Chief Judge held that: (1) absent failure to comply with Georgia procedural rule governing objection to composition of grand or petit juries petitioner had waived his right to challenge grand petit juries and had failed to show cause to excuse the waiver; (2) petitioner did not receive effective assistance of counsel during sentencing proceedings, and (3) where only relevant evidence indicated that petitioner did not contemplate taking of any money until after the murder, findings that murder was committed in course of armed robbery or for purpose of obtaining money were deficient.

Petition granted as to death penalty.

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1. Habeas Corpus ⇐25.1(3)

If a state has a valid rule of criminal procedure which requires defendant to object to the composition of the grand or petit jury before or during trial, failing which the objection is waived, a federal court will honor that rule by not allowing a defendant to raise the jury claim in a federal habeas proceeding. 28 U.S.C.A. § 2254.

2. Habeas Corpus ⇐25.1(3)

Where at trial level Georgia petitioner's counsel raised challenge to jury selection procedures but failed to produce any evidence, absent showing of prejudice the petitioner would be precluded by the valid Georgia waiver rule from raising the unconstitutional jury claims in federal habeas proceeding, and could be relieved from the waiver only by showing cause for failing to make a timely challenge and actual prejudice. Ga.Code, § 50-127(1); 28 U.S.C.A. § 2254.

3. Habeas Corpus ⇐25.1(3)

Georgia defendant, seeking federal habeas relief, was not relieved of operation of Georgia procedure rule requiring a defendant to object to composition of grand or petit jury before or during trial where he failed to establish claim of ineffective assistance of counsel at guilt stage and failed to show any way in which his waiver or composition of the actually impaneled grand or petit juries resulted in actual prejudice, in that indictment and conviction both rested on very strong and convincing evidence. Ga.Code, § 50-127(1); 28 U.S.C.A. § 2254.

4. Habeas Corpus ⇐30(1)

"Actual prejudice," for purpose of federal habeas relief, must be some extraneous influence which moves a tribunal to decide a case on an improper basis. 28 U.S.C.A. § 2254.

See publication Words and Phrases for other judicial constructions and definitions.

5. Criminal Law ⇐641.13(1)

Claims of ineffective assistance of counsel require the court to inquire into the actual performance rendered by counsel based on the totality of the circumstances. U.S.C.A.Const. Amend. 6.

6. Criminal Law ⇐641.13(1)

Counsel's effectiveness is not to be judged by hindsight. U.S.C.A.Const. Amend. 6.

7. Criminal Law ⇐641.13(1)

The Constitution does not guarantee errorless counsel; Sixth Amendment only guarantees the right to counsel reasonably likely to render and rendering reasonably effective assistance. U.S.C.A.Const. Amend. 6.

8. Criminal Law ⇐1208(1)

Under Georgia capital sentencing statutes, a defendant has substantial latitude as to the types of evidence that he may introduce at a presentencing hearing, and it is desirable for the jury to have as much information as possible when it makes the sentencing decision. Ga.Code, § 27-2503.

9. Criminal Law ⇐1208(1)

In assessing sentence under Georgia sentencing statutes, the sentencer should not be precluded from considering as a mitigating factor any aspect of a defendant's character or record and any other circumstances of the offense that the defendant proffers as a basis for a sentence less than death. Ga.Code, § 27-2503.

10. Habeas Corpus ⇐25.1(6)

To establish a constitutional violation where the defendant in a state trial is represented by retained counsel, it must be shown that counsel was so deficient as to render the proceedings fundamentally unfair in violation of due process or that counsel's errors were so obvious that a state official connected with the proceedings, such as a judge, was or should have been aware of the errors and could have taken corrective action. U.S.C.A.Const. Amends. 6, 14.

11. Criminal Law ⇐641.13(7)

Where although following closing arguments the trial judge instructed principal defense counsel's assistant to explain Georgia sentencing procedures, it should have

been clear that the latter's understanding and appreciation of the purposes behind the bifurcated nature of capital trials remained grossly deficient, the *MacKenna* Sixth Amendment standard of effective assistance of counsel was the proper test by which habeas court judged counsel's effectiveness. 28 U.S.C.A. § 2254; U.S.C.A. Const. Amend. 6.

12. Criminal Law ⇐641.13(7)

Georgia defendant was denied his constitutional right to reasonably effective assistance of counsel during sentencing in view of counsel's ignorance of capital sentencing procedures, failure to present any mitigating evidence during sentencing phase and refusal to allow petitioner to take the stand in his own behalf; deficiencies prevented jury from giving due consideration to mitigating factors of petitioner's character and circumstances of the offense, creating a substantial risk that petitioner receive the death sentence in spite of factors that in the jury's opinion would call for a lesser penalty. Ga.Code, § 27-2503; U.S.C.A.Const. Amends. 6, 14.

13. Homicide ⇐354

Evidence was not legally sufficient to support Georgia jury's capital penalty finding beyond a reasonable doubt that murder was committed in course of an armed robbery or for purpose of obtaining money where only relevant evidence indicated that defendant did not contemplate taking of any money until after shots had been fired and blows had been struck, i. e., after the murder had been committed; removal of victim's wallet or attempt to obtain money from bank could not be considered aggravating factors of the already committed murder. Ga.Code, § 27-2534.1(b)(2, 4).

Laughlin McDonald, Atlanta, Ga., for petitioner.

Arthur Bolton, Atty. Gen., State of Ga., Susan V. Boleyn, Asst. Atty. Gen., Atlanta, Ga., for respondent.

RULING ON PETITION FOR WRIT OF HABEAS CORPUS

WILBUR D. OWENS, Jr., Chief Judge.

Petitioner in the above styled action seeks federal habeas corpus relief under 28 U.S.C.A. § 2254. Petitioner is presently under a death sentence imposed by the Superior Court of Greene County, Georgia, following his conviction by jury in that court on February 19, 1976 of murder, armed robbery, and robbery by intimidation. Pursuant to 28 U.S.C.A. § 636(b)(1)(B), the petition was referred to United States Magistrate John D. Carey, who on August 7, 1980 entered proposed findings of fact and recommendations for disposition by the court. Pursuant to 28 U.S.C.A. § 636(b)(1)(C), petitioner has filed objections to the Magistrate's proposed findings and recommendations, and respondent has replied. This habeas corpus petition is now ready for determination by the court.

The enumerations of error asserted by petitioner in his § 2254 habeas corpus petition are listed in the Magistrate's proposed findings and recommendations for disposition. The Magistrate's proposed order holds against petitioner on each of his alleged grounds for relief, and recommends that the petition be denied. Petitioner's objections to the Magistrate's proposed findings reiterate in toto the enumerations of error underlying his habeas corpus petition.

Petitioner initially moves the court to grant an evidentiary hearing and oral argument on his habeas corpus petition or, alternatively, to recommit the petition to the Magistrate for an evidentiary hearing, on the grounds that the Magistrate's proposed findings and recommendations were made without a hearing or the receipt of additional evidence on several of petitioner's claims. Petitioner has submitted to the court in connection with his motion additional evidence consisting of affidavits, depositions, transcripts of various unrelated habeas corpus hearings, and other materials.

The Magistrate found, based on the entire record of the case, that the facts were

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fully and fairly developed in the state courts and therefore no additional evidentiary hearing is necessary. This court agrees. Moreover, the court can consider the additional documentary evidence submitted by petitioner without the necessity of an additional hearing or oral argument.

One ground upon which petitioner seeks habeas corpus relief is that the jury selection procedures for grand and traverse juries in Greene County, Georgia unconstitutionally discriminated on the grounds of race, sex, and age, resulting in petitioner's being indicted and convicted by unconstitutionally composed juries. Petitioner's counsel raised this challenge by motion for hearing prior to trial but failed to produce any evidence whatsoever at the hearing to support the allegations of discrimination, and a motion for a continuance for that purpose was denied by the trial judge. No evidence of unconstitutional jury selection procedures was thereafter presented on direct appeal to the Georgia Supreme Court; on petition for certiorari to the United States Supreme Court; or to the state courts in state habeas proceedings. In fact, no such evidence was presented until after the Magistrate's report was submitted to this court.

The Magistrate found that petitioner's jury composition challenge is without merit since petitioner has not shown some actual way in which the composition of the grand or petit juries resulted in prejudice, citing *Lumpkin v. Ricketts*, 551 F.2d 680 (5th Cir. 1977). The court agrees with this conclusion of the Magistrate; however, the court deems it necessary to expand on the proposed findings of the Magistrate on this question.

[1] If a state has a valid rule of criminal procedure which requires the defendant to object to the composition of the grand or petit jury before or during trial, failing which the objection is waived, then the federal courts honor that procedural rule by not allowing the convicted defendant to raise the jury claim in a federal habeas corpus proceeding. *Stewart v. Ricketts*, 451 F.Supp. 911 (M.D. Ga. 1978), *citing Francis v. Henderson*, 425 U.S. 536, 96 S.Ct. 1708, 48 L.Ed.2d 149 (1976); *Lumpkin v. Ricketts*, *supra*. Before 1975, the Georgia courts had established a decisional rule that a defendant's failure to object to the grand or traverse juries before or during trial waived that objection as a basis for habeas relief. This court in *Stewart* relied on this rule. In 1975 Georgia codified this rule in Ga. Code Ann. § 50-127(1). That section provides in pertinent part:

> The right to object to the composition of the grand or traverse jury will be deemed waived under this section, unless the person challenging the sentence shows in the petition and satisfies the court that cause exists for his being allowed to pursue the objection after the conviction and sentence has otherwise become final.

This section became effective as law well before the date of petitioner's trial.

In *Stewart*, *Lumpkin*, and other federal and state cases in which this waiver rule has been applied, the petitioners had completely failed to object to the grand or traverse juries until habeas proceedings. The question before the court in the instant case is whether, although having objected to the grand and traverse juries before trial, petitioner's failure to present any evidence whatsoever to support his challenge to those juries constitutes a waiver under Georgia's waiver rule. This question appears to have been answered by the Georgia Supreme Court in the recent case of *Patterson v. Balkcom*, 245 Ga. 563, 266 S.E.2d 179 (1980).

[2-4] The facts in *Patterson* are very similar to those in the present case. There the petitioner filed a challenge to the array of the grand and traverse juries before trial alleging systematic exclusion of blacks. At the hearing petitioner submitted evidence that an opportunity existed for discrimination from the source of the jury lists, but did not submit evidence concerning the racial composition of the juries. The trial court therefore overruled the challenge, and denied the petitioner's motion for a continuance. In state habeas proceedings petitioner submitted evidence of the racial composition of the juries. On review the Georgia

Supreme Court, applying Ga. Code Ann. § 50-127(1), held that petitioner had waived his challenge to the grand and traverse juries by not "perfecting" the challenge before the trial court by presenting evidence of the racial composition of the juries. The court went on to consider the evidence presented on state habeas to determine if petitioner had shown sufficient "cause" to be relieved of his waiver. It is clear from *Patterson* that petitioner in the instant case, having failed before or at trial to present evidence to support his challenge to the juries, would have been precluded by Georgia's waiver rule from raising the unconstitutional jury claims in his state habeas proceedings, absent a showing of prejudice.

Honoring Georgia's valid procedural rule as codified in Ga. Code Ann. § 50-127(1) and applied in *Patterson*, the court finds that petitioner waived his right to challenge the jury selection procedures of Greene County and the composition of the grand and traverse juries by failing to present evidence before or at trial to support his challenge. Petitioner may be relieved from the operation of this waiver, however, by showing cause for failing to make a timely challenge *and* actual prejudice. *Lumpkin v. Ricketts, supra.* Petitioner seeks to establish "cause" by alleging ineffective assistance of counsel. This argument must be rejected. *See Lumpkin v. Ricketts.* Id. at 682-83. Furthermore, the court finds, as did the Magistrate, that petitioner has failed to show any way in which his waiver or the composition of the actually impaneled grand or petit juries in his case resulted in actual prejudice. Actual prejudice must be some extraneous influence which moves a tribunal to decide a case on an improper basis, *Stewart v. Ricketts, supra, citing* McCormick, *Evidence* 439 (2d Ed. 1972). Petitioner's indictment and conviction both rest upon very strong and convincing evidence, a factor which belies any reliance by the grand or petit juries on any improper basis for their decisions. For these reasons, the court finds that petitioner has waived his right to challenge his grand and petit juries in this federal habeas corpus proceeding, and has failed to show cause for his now being allowed to pursue his objection to the composition of the grand and petit juries.

[5-7] Petitioner asserts as a second basis for habeas corpus relief that he was denied effective assistance of counsel at all stages of his trial in violation of his rights under the Sixth and Fourteenth Amendments to the Constitution of the United States. Claims of ineffective assistance of counsel require the court to inquire into the actual performance rendered by counsel based on the totality of the circumstances. *Lovett v. Florida*, 627 F.2d 706, (5th Cir., 1980). Counsel's effectiveness is not to be judged by hindsight; the Constitution does not guarantee errorless counsel. *Rummel v. Estelle*, 590 F.2d 103, 104 (5th Cir. 1979) (per curiam). The Sixth Amendment only guarantees a defendant the right to counsel "reasonably likely to render and rendering reasonably effective assistance." *MacKenna v. Ellis*, 280 F.2d 592, 599 (5th Cir. 1960).

Having carefully considered the entire record in this case, the court agrees with the proposed findings of the Magistrate that petitioner's attorneys together afforded him reasonably effective assistance of counsel during the investigative stage before trial, during the pretrial proceedings and jury selection, and during the guilt-innocence phase of the trial. The specific instances of alleged counsel error which petitioner asserts as grounds for his claim of ineffective assistance of counsel during these stages of the trial either do not in fact constitute errors or do not rise to constitutional proportions. However, having carefully reviewed the transcripts of petitioner's trial and the state habeas proceedings, the court finds that petitioner did not receive reasonably effective assistance of counsel during the sentencing stage of his trial. The court's conclusion rests on several significant factors.

First, petitioner's principal attorney, seventy-two year old Reuben Garland, had no apparent understanding whatsoever of the bifurcated nature of the Georgia capital

trial and sentencing procedures, Ga. Code Ann. §§ 27-2503(b) and 27-2534.1. Trial Transcript, pp. 619, 670-671. Mr. Garland did not appreciate the nature and purpose of these procedures even after they were explained to him by his young assistant immediately prior to the sentencing phase of trial. Transcript of Habeas Corpus Hearing, p. 128.

[8, 9] Ga. Code Ann. § 27-2503 provides that upon a return of a verdict of guilty the jury shall hear in a presentence hearing additional evidence in extenuation, mitigation, and aggravation of punishment and argument by the defendant or his counsel regarding the punishment to be imposed. The defendant is accorded substantial latitude as to the types of evidence that he may introduce, and it is desirable for the jury to have as much information as possible when it makes the sentencing decision. *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859, 869 (1976). The sentencer should not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2964, 57 L.Ed.2d 973, 990 (1978).

Second, due to his ignorance of Georgia's bifurcated capital sentencing scheme, Mr. Garland failed to present any evidence whatsoever during the sentencing stage in mitigation of punishment. Although some mitigating evidence came in indirectly during the guilt-innocence phase of trial, specifically petitioner's lack of prior convictions and the fact that the Sheriff of Greene County had given petitioner a favorable job reference, Mr. Garland failed to reiterate and emphasize these significant mitigating factors or to present other mitigating evidence of petitioner's good employment record and good character, to which a number of witnesses would have testified. Mr. Garland also refused to allow petitioner to take the stand in his own defense to present other mitigating factors to which he might be able to testify. Instead of attempting to present some evidence in mitigation of punishment, Mr. Garland apparently argued at the sentencing hearing that petitioner was crazy, a defense which he had unsuccessfully sought to develop at trial. In fact, it was during the guilt-innocence phase that Mr. Garland argued against the death penalty, to wit:

> Under the evidence of this case, I only ask you for life. I don't ask you for anything but life. Trial Transcript, p. 619.

Thus, Mr. Garland in effect admitted during the guilt-innocence phase of trial that petitioner was guilty, but that he only deserved a life sentence!

Third, there is no justification for Mr. Garland's refusal to allow petitioner to testify during the sentencing phase of trial. Mr. Garland's not allowing petitioner to testify during the guilt-innocence phase of trial, since he was trying to raise an insanity defense, was a matter of trial strategy; however, the failure to allow petitioner to testify during sentencing cannot be justified on that basis. Petitioner should have been allowed to take the stand in his own behalf to present any possible mitigating circumstances surrounding the killing and plead with the jury not to sentence him to death. This is especially true where no evidence was presented in petitioner's behalf at the sentencing hearing. Mr. Garland's actions deprived petitioner of the only sentencing phase witness for the defense, the petitioner himself. Under the facts of this case, the court cannot say that refusing to allow petitioner to testify was nonprejudicial. Considering the statement made by petitioner after the jury had already recommended death, it is the court's opinion that petitioner's testimony, if he had been allowed to give it, could have had a substantial impact on the jury's decision regarding the death penalty.

The Fifth Circuit in at least one case has characterized the right to testify as "an inherently personal fundamental right that can be waived only by the defendant and not by his attorney." *Winters v. Cook*, 489 F.2d 174, 179 (5th Cir. 1973). Petitioner

testified during the state habeas hearing that he asked Mr. Garland several times during the sentencing stage of trial to allow him to testify in his own behalf, and the fact that petitioner was finally allowed to give a statement after sentencing supports that testimony. Of course, since he had already been sentenced to death, his statement came too late to have any possible effect on the jury's decision to recommend death.

[10, 11] Finally, the court notes that this case satisfies the test laid down in *Fitzgerald v. Estelle*, 504 F.2d 1334 (5th Cir. 1974) (*en banc*), *cert. den.* 422 U.S. 1011, 96 S.Ct. 2636, 45 L.Ed.2d 675 (1975), and recently affirmed by the Fifth Circuit in *United States v. Guerra*, 628 F.2d 440, (5th Cir. 1980), that in order to establish a constitutional violation where the defendant in a state trial is represented by retained counsel, it must be shown that retained counsel was so deficient as to render the proceedings fundamentally unfair in violation of due process or that retained counsel's errors were so obvious that a state official connected with the proceedings, such as a judge, was or should have been aware of counsel's errors and could have taken corrective action. Pretermitting the question of whether Mr. Garland's ineffectiveness during the sentencing stage of trial rendered those proceedings fundamentally unfair, it is clear that the trial judge in this case was well aware of Mr. Garland's total ignorance of Georgia capital sentencing procedures, as well as various other deficiencies which he exhibited during trial. Although following closing arguments the trial judge instructed Mr. Garland's young assistant to explain Georgia's sentencing procedures to Mr. Garland, it is clear to this court and should have been clear to the trial judge that Mr. Garland's understanding and appreciation of the purposes behind the bifurcated nature of capital trials remained grossly deficient. Therefore, the *MacKenna*, *supra*, Sixth Amendment standard of effective assistance of counsel is the proper test by which to judge counsel's effectiveness in this case. *See, Fitzgerald v. Estelle*, *supra*.

[12] Mr. Garland's performance during the sentencing phase of petitioner's trial prevented the jury from giving due consideration to mitigating factors of petitioner's character and the circumstances of the offense, thus creating a substantial risk that petitioner received the death sentence in spite of factors that in the jury's opinion would call for a lesser penalty. *Lockett v. Ohio*, *supra*, 438 U.S. at 606, 98 S.Ct. at 2965, 57 L.Ed.2d at 990. The court concludes that Mr. Garland's ignorance of Georgia capital sentencing procedures, his failure to present any mitigating evidence during the sentencing phase of trial, and his refusal to allow petitioner to take the stand during the sentencing phase in his own behalf, viewed together, deprived petitioner during the sentencing phase of his trial for murder of his Sixth and Fourteenth Amendment rights to reasonably effective assistance of counsel. Petitioner is therefore entitled to be resentenced in proceedings in which he is afforded his constitutional right to effective assistance of counsel.

[13] Petitioner also asserts as a basis for habeas corpus relief that the evidence at trial did not support the jury's finding of statutory aggravating circumstances contained in Ga. Code Ann. § 27-2534.1(b)(2), that the murder was committed during the course of an armed robbery, and § 27-2534.1(b)(4), that the murder was committed for the purpose of obtaining money. Having carefully considered all of the evidence presented at trial, the court finds that the evidence was not legally sufficient to support the jury's finding beyond a reasonable doubt that the murder was committed *in the course of* an armed robbery or *for the purpose of* obtaining money. The only relevant evidence presented at trial indicated that petitioner did not contemplate the taking of any money until after the shots had been fired and the blows had been struck, i. e., after the murder had been committed. *See*, Testimony of F.B.I. Agent Kane, Trial Transcript, pp. 372-373. Based on the evidence presented at trial, that petitioner pri-

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or to the commission of the murder had any intent to rob the victim is only speculation. Certainly the evidence does not prove these aggravating factors beyond a reasonable doubt. Considering the evidence in this case and the plain language of Ga. Code Ann. § 27-2534.1(b)(2) and (4), the removal of the victim's wallet and the attempt to obtain money from the bank cannot be considered as aggravating factors of the already committed murder. Petitioner was therefore sentenced to death based on an improper finding of aggravating circumstances, and for this reason must be resentenced.

The court notes, however, that the circumstances of this murder may justify a finding of some other aggravating circumstance, such as aggravated battery. In resentencing petitioner, respondent may wish to consider Ga. Code Ann. Sections 27-2534.1(b)(2) and 27-2534.1(b)(7), being mindful, however, of the United States Supreme Court's decision in *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980).

Having been carefully considered, the findings and recommendations of the Magistrate with respect to petitioner's other claims in this habeas corpus petition are received with approval and adopted as the remainder of the court's opinion in this matter.

Accordingly, this petition for writ of habeas corpus is hereby granted only as it pertains to the imposition of the death sentence. The respondent is hereby ordered to commence resentencing procedures within 180 days failing which a writ of habeas corpus will be granted.

At such time as petitioner has been resentenced respondent shall file a certified copy of respondent's sentence with the Clerk of this court.

Charlie YOUNG, Jr., Petitioner-Appellee, Cross-Appellant,

v.

Walter ZANT, Warden, Georgia Diagnostic & Classification Center, Respondent-Appellant, Cross-Appellee.

No. 81-7123.

United States Court of Appeals, Eleventh Circuit.

May 14, 1982.

Georgia prisoner sought federal habeas corpus. The United States District Court for the Middle District of Georgia, at Athens, Wilbur D. Owens, Jr., Chief Judge, 506 F.Supp. 274, found that defendant had been denied effective assistance of counsel during presentencing phase of bifurcated trial and set aside death sentence, but found no constitutional infirmity as to the convictions, and both the defendant and the state appealed. The Court of Appeals, Tjoflat, Circuit Judge, held that defendant was deprived of constitutional right to effective assistance of counsel in defending all of the charges against him.

Reversed.

1. Habeas Corpus ⇐90

District court in habeas corpus proceeding was not bound by state court's determination that petitioner had received adequate representation, since effective assistance of counsel is a mixed question of law and fact.

2. Criminal Law ⇐641.13(1)

Criminal defendant is not entitled to error-free counsel, nor can he complain of representation that might be judged ineffective only by benefit of hindsight. U.S.C.A.Const.Amend. 6.

3. Criminal Law ⇐641.13(3, 4)

If counsel's conduct at trial, viewed in the context of the totality of the circumstances, falls below the range of competency generally demanded of attorneys in criminal cases, criminal conviction obtained through such a trial unconstitutionally deprives defendant of liberty, and competence of appointed and retained counsel is judged by the same standard. U.S.C.A.Const. Amend. 6.

4. Criminal Law ⇐1134(2)

Whether defense counsel has rendered adequate assistance is a mixed question of fact and law that requires the application of legal principles to the historical facts of the case.

5. Habeas Corpus ⇐113(12)

Absent clearly erroneous determination by district court in habeas corpus proceeding on issue of effective assistance of counsel, Court of Appeals defers to district court's findings on such primary facts as what the attorney did or did not do during the course of trial, but will apply its own judgment to the question of whether that conduct constituted the ineffective assistance.

6. Criminal Law ⇐641.13(2)

Defendant was deprived of effective assistance of counsel in state court trial for malice murder, armed robbery, and robbery by intimidation, where counsel adopted unsupportable defense to all counts and ignored obvious defenses to malice murder and armed robbery charges, conceded guilt of all three crimes, and did so because of mistaken belief that such action was strategically necessary in order to make a strong plea for mercy, as he was unaware of Georgia's bifurcated proceeding in death penalty cases. U.S.C.A.Const.Amend. 6.

Susan V. Boleyn, Asst. Atty. Gen., Atlanta, Ga., for respondent-appellant, cross-appellee.

Laughlin McDonald, Atlanta, Ga., Randolph Z. Volkell, Hollis, N.Y., for petitioner-appellee, cross-appellant.

Before TJOFLAT, HILL and ANDERSON, Circuit Judges.

TJOFLAT, Circuit Judge:

On February 19, 1976, the petitioner, Charlie Young, Jr., was convicted of malice murder, armed robbery and robbery by intimidation by a jury in the Superior Court of Greene County, Georgia. The jury, following a presentencing hearing, recommended that Young be sentenced to death on the malice murder charge, and the court sentenced Young accordingly. The court also sentenced Young to life imprisonment on the armed robbery charge and to twenty years for robbery by intimidation.

[1] After exhausting his state remedies,[1] Young commenced this habeas corpus proceeding in the district court, contending that his convictions were invalid because he was denied his sixth and fourteenth amendment right to effective assistance of counsel. The district court found that Young had been denied effective assistance of counsel during the presentencing phase of

1. The Supreme Court of Georgia affirmed Young's convictions and the death sentence. *Young v. Georgia*, 237 Ga. 852, 230 S.E.2d 287 (1976). Young then filed a petition for a writ of habeas corpus in the Superior Court of Butts County, Georgia. After conducting an evidentiary hearing, the court denied the petition. The Supreme Court of Georgia affirmed, and the Supreme Court of the United States denied certiorari. *Young v. Ricketts*, 242 Ga. 559, 250 S.E.2d 404 (1978), cert. denied, 442 U.S. 934, 99 S.Ct. 2870, 61 L.Ed.2d 304 (1979).

his bifurcated trial and set aside the death sentence.[2] *Young v. Zant*, 506 F.Supp. 274 (M.D.Ga.1980). The court also determined that the evidence the jury was permitted to consider in deliberating the death penalty was insufficient to prove that the homicide was committed under either of the two aggravating circumstances alleged by the State, namely, that Young committed the murder during the course of an armed robbery or for the purpose of obtaining money,[3] and cited this failure of proof as an alternative ground for setting aside the death sentence.[4] As to the guilt phase of Young's trial, the court found no constitutional infirmity and therefore upheld each of Young's convictions. *Id.*

Both Young and the State of Georgia appeal. Young contends that his trial attorney, Reuben A. Garland, was unaware of the existence or purpose of the bifurcated trial procedure in Georgia death penalty cases whereby the issues of guilt and punishment are considered by the jury in separate proceedings;[5] Garland believed that the jury would, in accordance with the former Georgia procedure, consider guilt and punishment together. According to Young this complete lack of understanding of how his case was to be tried caused Garland to adopt a trial strategy of conceding Young's guilt and pleading for mercy during the guilt phase of the proceeding. Had Garland known that the jury would not be considering whether to recommend mercy as it deliberated the issue of guilt, Young contends, Garland would not have conceded that issue to the State. Instead, he would have argued that Young was guilty not of malice murder but of some lesser included offense, such as voluntary manslaughter, and thus would have removed altogether the threat of the death penalty from the case. Garland also would have argued that the evidence did not support the charges of armed robbery or robbery by intimidation.

The State concedes, as it must on this record, that Garland was unaware of Georgia's bifurcated proceeding in death-penalty cases but contends that he nevertheless provided Young with adequate representation at both the guilt and presentencing phases of the trial. The State also submits that the evidence proved the two aggravating circumstances alleged in Young's indictment and that the sentence of death was therefore lawfully imposed. The State asks that we reverse the district court and deny the writ.

An examination of the record of the trial makes it plain that Garland did not accord

2. The district court based its conclusion on the evidence adduced at the hearing conducted by the state trial court on Young's habeas petition. Since effective assistance of counsel is a mixed question of law and fact, the district court was not bound by the state court's determination that Young had received adequate representation. *See Cuyler v. Sullivan*, 446 U.S. 335, 341-42, 100 S.Ct. 1708, 1714-15, 64 L.Ed.2d 333 (1981); *Baty v. Balkcom*, 661 F.2d 391, 394 n.7 (5th Cir. 1981).

3. The district court concluded that the undisputed evidence showed that Young's victim, Reuben H. Flynt, was completely incapacitated before Young formed the intent to rob him. Thus, the court reasoned, the State had failed to prove that any of the essential elements of armed robbery, the taking of property from a person "by use of an offensive weapon," Ga. Code Ann. § 26-1902, occurred prior to the assault, nor had it shown that Young's purpose in assaulting Flynt was to obtain money.

Curiously, the district court did not discuss the legal effect of Flynt's incapacity, and therefore Young's taking without "use of an offensive weapon," on the validity of Young's conviction for armed robbery. This might have been due to petitioner's failure to make the claim that the State's evidence was insufficient under the standard set forth in *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

4. At least one aggravating circumstance must be established beyond a reasonable doubt to authorize the imposition of the death penalty under Georgia law. Ga.Code Ann. § 27-2534.1(c).

5. Pursuant to Ga.Code Ann. § 27-2503(b), the jury first considers only the question of guilt or innocence. If it returns a guilty verdict and the State seeks the death penalty, the trial is resumed. The jury then considers evidence of aggravating and mitigating circumstances and the arguments of counsel. If the jury finds at least one aggravating circumstance beyond a reasonable doubt, it must decide whether to recommend the death sentence. *See* Ga.Code Ann. § 27-2534.1(c).

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Young even a modicum of professional assistance at any time. The petitioner's convictions are consequently invalid, and we direct the district court to issue the writ of habeas corpus.

I.

A.

The State's murder and armed robbery cases against Charlie Young were built on a confession he gave to FBI agents following his arrest and on the testimony of expert witnesses who corroborated his confession with the results of the ballistics, fingerprint and blood tests they conducted. There were no eyewitnesses other than Charlie Young. The State's case of robbery by intimidation, on the other hand, was established principally by persons who saw the offense committed.

According to the confession, on December 15, 1975, Charlie Young, accompanied by his nephew Derwin Young, drove from Atlanta to Union Point, Georgia, hoping to meet with Reuben H. Flynt, vice president of Farmers Bank in Union Point. Flynt had made two bank loans to Charlie Young, and Young had fallen behind in his payments. He feared that the bank would ask his grandmother, who had co-signed his notes, to assume his obligations. He wanted Flynt to set up a new payment plan that would not involve his grandmother.

Charlie and Derwin Young arrived in Union Point during the lunch hour. They drove immediately to Farmers Bank. When Charlie Young noticed that Flynt's automobile was not there, they drove on to Flynt's house, back to the bank and finally back to Flynt's house before Young spotted Flynt's car. They parked in Flynt's driveway, and Charlie Young went to the front door of Flynt's house and rang the bell. Flynt met Young at the door and told him to return to the bank, where Flynt would meet him in thirty minutes. Young was dissatisfied with this arrangement, so he went to his car, got his wife's .22 caliber pistol, returned to the house, walked in and began discussing the two loans with Flynt. During the course of the discussion, Young telephoned his grandmother's house but was unable to reach her. The conversation resumed and led to a heated argument. The two men struggled. Young hit Flynt several times with the butt of the gun and shot him four times at close range. As Flynt lay dying, Young ripped the telephone from the wall and removed Flynt's billfold from his rear pocket.

At this point, Young thought of a way of getting money from Farmers Bank. He returned to his car, and he and Derwin Young drove to the bank. Following Charlie's instructions, Derwin entered the bank, handed Flynt's wallet to a teller and said, "The man that gave me this billfold said for you to give me $60,000 or he will kill Reuben Flynt in fifteen minutes." The teller immediately notified the president of the bank, John Stewart, who called the police and the FBI and then instructed the teller to give Derwin Young $10,000. As Derwin left the bank with the money he was arrested by police officers responding to Stewart's call.

When Derwin Young did not return to the car, Charlie Young fled to his grandmother's house. The police followed him there, arrested him and took him to the Greene County Courthouse. At the courthouse, Charlie Young was questioned and gave the confession that made the State's case. He also consented to a search of his automobile.[6] The search yielded the .22 caliber pistol Young used to kill Reuben Flynt and Flynt's checkbook covered with blood.

In January 1976, a Greene County grand jury indicted Charlie Young, charging him with the malice murder, Ga.Code Ann. § 26-1101(a), and armed robbery of Reuben H. Flynt, Ga.Code Ann. § 26-1902, and the robbery of John Stewart, the Farmers Bank president, by intimidation, Ga.Code Ann.

6. Neither the admissibility of Young's statement nor the propriety of the search is challenged in this appeal.

§ 26-1901. The prosecutor gave timely notice that if Young were convicted of malice murder, the State would establish two aggravating circumstances in the presentencing hearing: that the defendant committed the murder during the commission of another capital felony, armed robbery, Ga.Code Ann. § 27-2534.1(b)(2), and that he committed it for the purpose of obtaining money, Ga.Code Ann. § 27-2534.1(b)(4). The prosecutor would ask the jury to recommend the death penalty if it found either of these aggravating circumstances beyond a reasonable doubt. At his arraignment Young entered a plea of not guilty.

Charlie Young's family retained Reuben A. Garland to represent him at trial. Garland, a member of the Georgia bar since 1930, was assisted by Frank Petrella, a young associate of an Atlanta law firm. The firm loaned Petrella to Garland strictly for Young's trial; Petrella was not retained by Young's family. Garland relegated Petrella to a minor role in the case, making it plain at the outset that Petrella was to speak only when Garland addressed him.

B

The State's burden was clear from the start. To obtain a conviction for malice murder the prosecution was required to prove that the accused deliberately intended to kill Reuben H. Flynt under circumstances devoid of considerable provocation or showing an abandoned and malignant heart. Ga.Code Ann. § 26-1101(a). To obtain a conviction for armed robbery the prosecution was required to prove that with intent to commit theft of a person, the accused took Flynt's billfold by using an offensive weapon. Ga.Code Ann. § 26-1902(a). To establish robbery by intimidation the prosecution was required to prove that, under the accused's direction, Darwin Young took money from John Stewart by placing him in fear of Flynt's safety. Ga.Code Ann. § 26-1901.

Garland had two options in preparing Young's defense: he could put the State to the proof or he could seek to avoid the State's case with an affirmative defense. Garland opted for the latter strategy; he would establish that his client was not guilty by reason of insanity.[7] Garland could not support this defense, however. Charlie Young's confession gave no indication that Young was insane when he assaulted Flynt, and Garland did not uncover any evidence that pointed to insanity. Indeed Garland did not even have his client examined by a psychiatrist to determine his mental capacity at the time of the alleged offenses. Garland did enter a special plea of insanity prior to trial, but he entered it under the erroneous belief that the plea raised the question of whether Young was insane when the offenses were committed.[8] A special plea of insanity, under Georgia law, actually questions the defendant's competence to stand trial, Ga.Code Ann. § 27-1502; it has nothing whatever to do with the affirmative defense of insanity, which is raised by a general plea of insanity. A court ordered psychiatric examination demonstrated that the defendant was competent to stand trial, and Garland withdrew his special plea of insanity.[9] Garland thus proceeded to trial on an insanity defense he could not possibly establish.

The trial began on February 17, 1976. Jury selection took approximately one and one-half days, and the State began its case on the afternoon of the 18th with the prosecutor calling twelve witnesses. Garland failed to cross-examine four of these witnesses and his questioning of all but one of the other eight was cursory and superficial. At the end of the afternoon, the court announced that it would run a night session and adjourned for dinner. Garland subse-

7. Frank Petrella testified in the state habeas corpus proceedings that, from the beginning, Garland considered insanity the only plausible defense.

8. When he testified in the state habeas corpus proceeding, Garland did not know the difference between a general and a special plea of insanity under Georgia law.

9. The psychiatrist found that Young understood the charges lodged against him and was competent to assist counsel in his defense.

quently met the trial judge on the courthouse steps and told him that he would not be present when the trial resumed that evening. He did not ask the court to cancel the night session; nor did he tell his client that he would be absent.

Petrella filled in for Garland that evening, and though he was not prepared to cross-examine the six witnesses the State called to the stand, all experts from the Georgia Crime Lab, he did so. Garland reappeared the next morning, and the State put on its last five witnesses. He briefly cross-examined three of them. The State then rested, having established the facts we have related. The defense had no evidence to present, so it also rested. Garland made no motion for a directed verdict of acquittal. The court then held a brief charge conference. Garland requested two instructions, a charge on insanity and a charge regarding the right of the defendant to remain silent. Despite the absence of evidence in the record to support a finding of insanity, the court included both requested charges in its final instructions to the jury. No mention of the death penalty was made either during the charge conference or in the court's proposed instructions. Under Georgia's bifurcated procedure in death-penalty cases, of course, whether the death penalty or mercy should be recommended by the jury was not germane to the determination of guilt or innocence.

Inexplicably, Garland somehow convinced himself that the jury would be instructed to make a recommendation on the death penalty as it deliberated the question of guilt on the malice murder charge. Because it was beyond dispute that his client had killed Reuben Flynt and might be found guilty of malice murder, Garland focused his entire argument to the jury on the punishment it should mete out. He abandoned any notion that the jury might be persuaded to find his client guilty of the lesser crime of manslaughter on the theory that Flynt's homicide was committed during a heated argument. He also abandoned, for lack of proof, his defense that his client was insane at the time of the offense. As his argument unfolded, Garland conceded that his client was guilty of malice murder and begged for mercy. He assured the jury that Young would never be returned to society with these words: "Under the evidence of this case, I only ask you for life ... under the evidence of this case he will never get a pardon." [9] Although the trial judge admonished Garland to save his argument on punishment for the sentencing phase of the trial, if one became necessary, Garland failed to heed this admonition and continued to plead for mercy.

With both the prosecution and the defense advising it that Charlie Young had committed malice murder, the jury promptly found Young guilty of that offense and armed robbery and robbery by intimidation as well. The court then declared a brief recess so the parties could prepare for the presentencing hearing on the death penalty issue. By this time it was clear to the trial judge that although Garland had more than a half century of experience in the trial of criminal cases, Garland did not comprehend the purpose of the presentencing hearing; so the judge instructed Petrella to explain the procedure to Garland. Petrella advised Garland that this was the time for the defense to introduce mitigating evidence that might lead the jury to recommend no death sentence and he advised Garland that Young could be put on the stand to explain his actions even though he had not testified in the earlier proceeding. As the district court noted, Charlie Young was college-educated and articulate, he had never been in trouble with the law, and he had received a favorable employment recommendation from the Sheriff of Greene County. This favorable background might have prompted the jury to recommend mercy, but Garland did not call Young to the stand or introduce any evidence.

10. [illegible] Garland's closing argument [illegible] however we think it is clear that the quoted remark was an admission by Garland in the guilt phase of trial that his client was guilty. See Young v. Zant, 506 F.Supp. at 279.

We do not have the transcript of the lawyers' final summations to the jury. We assume that Garland attempted to rebut the State's claim that the malice murder had been committed in the course of another capital felony or for the purpose of obtaining money. We also assume that Garland concluded, as he did when he addressed the jury in the guilt phase of the trial, with a naked plea for mercy. We do know that the jury rejected his plea, for it recommended that Young be sentenced to death.

II.

[2, 3] A criminal defendant has a constitutional right to competent counsel; and we judge the competence of appointed and retained counsel by the same standard. *Cuyler v. Sullivan*, 446 U.S. 335, 344-45, 100 S.Ct. 1708, 1716, 64 L.Ed.2d 333 (1980). A criminal defendant is not entitled to error-free counsel. *Mylar v. Alabama*, 671 F.2d 1299, 1300 (11th Cir. 1982). Nor can he complain of representation that might be judged ineffective only by the benefit of hindsight. *Clark v. Blackburn*, 619 F.2d 431, 433 (5th Cir. 1980).[11] However, if counsel's conduct at trial, viewed in the context of the totality of circumstances, falls below the range of competency generally demanded of attorneys in criminal cases, a criminal conviction obtained through such a trial unconstitutionally deprives the defendant of his liberty. *See Cuyler v. Sullivan*, 446 U.S. at 344, 100 S.Ct. at 1715-1716; *McMann v. Richardson*, 397 U.S. 759, 771, 90 S.Ct. 1441, 1449, 25 L.Ed.2d 763 (1970); *Mylar v. Alabama*, 671 F.2d at 1301; *Baty v. Balkom*, 661 F.2d 391, 394 (5th Cir. 1981).

[4, 5] Whether defense counsel has rendered adequate assistance is a mixed question of fact and law that requires the application of legal principles to the historical facts of the case. *Cuyler v. Sullivan*, 446 U.S. at 341-42, 100 S.Ct. at 1715; *see Baty v. Balkom*, 661 F.2d at 394 n.7. Absent a clearly erroneous determination, we defer to the district court's findings on such primary facts as what the attorney did or did not do during the course of the trial. However, we will apply our own judgment to the question of whether that conduct constituted ineffective assistance.

[6] Where defense counsel is so ill prepared that he fails to understand his client's factual claims or the legal significance of those claims or that he fails to understand the basic procedural requirements applicable in court, we have held that counsel fails to provide service within the range of competency expected of members of the criminal defense bar. *See Baty v. Balkom*, 661 F.2d at 394-95; *Kemp v. Leggett*, 635 F.2d 453 (5th Cir. 1981); *Gaines v. Hopper*, 575 F.2d 1147 (5th Cir. 1978). Although the degree of preparation adequate to defend a particular client is not always easy to discern, we find no difficulty on the facts of this case. We wholeheartedly agree with Young's contention that a competent defense lawyer would have handled this case far differently than Garland did.

First, competent counsel would not have gone to trial on an insanity defense without evidence to support it. *Cf. Gaines v. Hopper*, 575 F.2d at 1149 (counsel was not competent where, as the result of his failure to prepare, he was in no better position than his jailed client to evaluate the legal realities of the case or make informed evaluation of potential defenses). The insanity defense in this case amounted to no defense at all, a fact Garland apparently did not recognize until counsel began their final summations to the jury.

Second, competent counsel would have been sufficiently familiar with his client's case to recognize the weak points in the State's cases on both the malice murder and armed robbery charges. *See, e.g., Baty v. Balkom*, 661 F.2d at 394-95. Competent counsel would have determined that the evidence that Young took Reuben Flynt's life with malice aforethought was extremely thin. To be sure the State had Young's confession, but that confession contained

11. We are bound by decisions of the Fifth Circuit Court of Appeals rendered before the close of business on September 30, 1981. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

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scant evidence of a predisposition to commit murder; and it provided the defense with strong evidence that the homicide was committed in the heat of passion and was not malice murder but manslaughter. Competent counsel would also have realized that there was little doubt that Young drove to Union Point to see Flynt about two bank loans, not to kill him, and that the seeds of the crimes in this case were not planted until, at Flynt's house, Flynt asked Young to return to the bank. Counsel would have argued that this rejection obviously did not sit well with Young because he wanted to dispose of his financial problem then and there, and that Young thought his wife's 22 caliber pistol would be of assistance, so he went to his car to get it. In short, competent counsel would have immediately recognized that there was nothing in Young's confession that indicated that Young intended to use the gun for any purpose other than to force Flynt to discuss the loans. If anything, the confession shows that Young became quite confused as to what to do after he returned to Flynt's house and even attempted to telephone his grandmother for advice. The pistol apparently came into play only when the argument broke out and the struggle ensued. Young used it to subdue Flynt, and he killed Flynt in the process.

It is not within the district court's or our province to say whether on this record Young was guilty of malice murder or some lesser included offense. But it is our duty to determine whether Young received legal representation that passed constitutional muster. In this case, given the evidence the State produced, we have no difficulty at all in concluding that Young's counsel neglected a very strong argument that Young killed Flynt in the heat of passion and thus was guilty, if at all, of voluntary manslaughter. *See* Ga.Code Ann. § 26-1102. At the very least, counsel should have requested a jury instruction on that lesser included offense, since in the absence of such a request the court is not required to give the instruction. *See Jackson v. Georgia*, 239 Ga. 40, 235 S.E.2d 477 (1977).

Turning to the armed robbery count, we note the district court, in assessing the sufficiency of the State's evidence of aggravating circumstances on the malice murder charge, concluded that the State did not produce sufficient evidence to permit the jury to find beyond a reasonable doubt that Young had formed the intent to rob Flynt prior to the fatal assault. *Young v. Zant*, 506 F.Supp. at 280-81. This deficiency in the evidence should have been sufficiently clear to Garland to suggest a strong argument that Young did not rob Flynt by use of an offensive weapon and thus could not be guilty of armed robbery under Ga.Code Ann. § 26-1902.[12]

Garland's failure to adopt the obvious defenses to the State's murder and armed robbery charges and his failure to request a charge on voluntary manslaughter indicates such lack of preparation and exercise of skill that we do not hesitate to conclude that his conduct fell far short of that required of counsel in a criminal trial. *See Kemp v. Leggett*, 635 F.2d at 454. However, Garland's incompetent conduct went even further, for he not only adopted an unsupportable defense to all counts and ignored the obvious defenses to the malice murder and armed robbery charges, he conceded his client's guilt of all three crimes for which he was charged in the guilt phase of the trial; and he did so because of his mistaken belief that such an action was strategically necessary in order to make a strong plea for mercy. Whether, on the facts of this case, such a tactical decision would have been proper under the former Georgia criminal procedure, which Garland still believed to be in effect, we can discern no possible reason for this conduct under the present bifurcated procedure. Garland simply failed to inform himself of basic Georgia criminal procedure, a failure that, in this instance, deprived Young of his constitutional right to effective assistance of

12. Although the petitioner did not raise a claim regarding the sufficiency of the evidence to support his armed robbery conviction, we con- sider the insufficiency of that evidence in assessing the adequacy of Garland's assistance to Young under the sixth amendment.

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counsel in defending all of the charges against him.

The district court's denial of the writ of habeas corpus with respect to the guilt phase of Charlie Young's trial is therefore REVERSED. On receipt of the mandate, the district court shall grant the writ.

IN THE SUPERIOR COURT FOR THE COUNTY OF GLYNN.

STATE OF GEORGIA

STATE OF GEORGIA	X	INDICTMENT # 11369
	X	
VS.	X	
	X	
CHARLIE YOUNG	X	

NOTICE OF STATUTORY AGGRAVATING CIRCUMSTANCES

The State of Georgia contends and alleges that the following aggravating circumstances in said case authorizes the imposing of the death penalty:

1. The offense of murder of REUBEN FLYNT was committed while the offender, CHARLIE YOUNG, was engaged in the commission of another capital felony, to-wit: Armed Robbery of REUBEN FLYNT.

2. The offender, CHARLIE YOUNG, committed the offense of murder of REUBEN FLYNT for the purpose of receiving money or other things of value for himself.

3. The offense of murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

RESPECTFULLY SUBMITTED this 8th day of December, 1982.

JOSEPH H. BRILEY
DISTRICT ATTORNEY
OCMULGEE JUDICIAL CIRCUIT
P.O. Box 361
Gray, Georgia 31032
(912) 986-3166

Served on Atty. Hosking
in open Court 4:00 pm
on 8th day of Dec., 1982

IN THE SUPREME COURT

OF

THE UNITED STATES OF AMERICA

CHARLIE YOUNG, JR.,	)	
	)	
Petitioner	)	October Term, 1983
	)	
vs.	)	
	)	
THE STATE OF GEORGIA,	)	Case No._____
	)	
Respondent	)	

MOTION FOR LEAVE OF COURT TO PROCEED IN FORMA PAUPERIS

Charlie Young, Jr., petitioner in the case captioned above, by his undersigned counsel, asks leave of court to file the attached Petition for Writ of Certiorari to the Supreme Court of Georgia without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46 of the Rules of the Supreme Court of the United States. In support of his motion, petitioner has attached the following documents: (1) an affidavit of poverty, executed by the petitioner, in conformity with the provisions of Rule 46.1; (2) an affidavit, executed by the petitioner's counsel in the matter before this court, affirming that he is serving as petitioner's counsel without compensation of any description.

Wade M. Crumbley

WADE M. CRUMBLEY
Crumbley & Crumbley
P.O. Box 775
McDonough, Georgia 30253
(404) 957-1815

Attorney for Petitioner

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA

CHARLIE YOUNG	*	October Term 1983
Petitioner	*	
v.	*	
THE STATE OF GEORGIA	*	
Respondent	*	Case Number

AFFIDAVIT OF INDIGENCY

Personally before the undersigned officer who is authorized to administer oaths appeared Charlie Young Jr., who under oath gives the following statement, to wit:

1.

I offer this affidavit in support of my motion for leave of the Court to proceed in forma pauperis in the above captioned case.

2.

My name is Charlie Young Jr. and I am the petitioner in the above styled case.

3.

I have been continuously imprisoned since December of 1975. Because of my poverty I am unable to pay the cost of these proceedings. I own no real or personal property. I have no income.

4.

I am unable to give security in this case.

5.

My council in this case in the State Court System were appointed because of my indigency. My council in this Court is serving on a volunteer basis and without compensation of any description.

6.

I believe I am entitled to the redress I seek in this case.

The nature of the case is briefly stated as follows: I was convicted of murder in the Superior Court of Greene County, Georgia and sentenced to death on February 19, 1976. On December 5, 1980, the Federal District Court for the Middle District of Georgia ruled on my petition for Writ of Habeas Corpus that the State had failed to present sufficient evidence in support of the aggravating circumstances alledged in seeking the death penalty. This ruling was not disturbed by the Eleventh U. S. Circuit Court of Appeals on appeal by the State. I have now been reindicted and the State is again seeking the death penalty. I believe that this is in violation of my rights under the Fifth and Fourteenth Amendments to the Constitution of the United States of America.

This 1st day of September, 1983.

Charlie Young, Jr.

Charlie Young, Jr.

Sworn to and subscribed
before me this 1st day
of September, 1983.

NOTARY PUBLIC

MY COMMISSION
EXPIRES 6-3-84

IN THE SUPREME COURT

OF

THE UNITED STATES OF AMERICA

CHARLIE YOUNG, JR.,	)	
	)	
Petitioner	)	October Term, 1983
	)	
vs.	)	
	)	
THE STATE OF GEORGIA,	)	Case No._____
	)	
Respondent	)	

STATE OF GEORGIA	)
	)
COUNTY OF HENRY	)
	)
_____	)

Personally before the undersigned officer duly authorized to administer oaths appeared WADE M. CRUMBLEY, who, after being duly sworn, states:

1.

I am a member of the State Bar of Georgia and am a member of the Bar of the Supreme Court of the United States. I am representing Charlie Young, Jr., the petitioner in the case captioned above, as a volunteer and without compensation of any kind or description.

2.

Charlie Young, Jr., to my knowledge, has been continuously imprisoned since December of 1975, and has no property, assets of any description, or income.

3.

Charlie Young, Jr., was represented in the State court proceedings leading to the filing of this motion and petition by Donald W. Huskins, Esq., of Eatonton, Georgia, who was appointed by the Superior Court of Greene County, Georgia, due to

Mr. Young's indigency.

Wade M. Crumbley
Wade M. Crumbley

Sworn to and subscribed before me
this 1st day of September, 1983

Notary Public
My commission expires 2/16/87

83-5365

IN THE SUPREME COURT

OF

THE UNITED STATES OF AMERICA

Office - Supreme Court, U.S.
FILED
SEP 6 1983
ALEXANDER L. STEVAS
CLERK

CHARLIE YOUNG, JR.,	)	
	)	
Petitioner	)	October Term, 1983
	)	
vs.	)	
	)	
THE STATE OF GEORGIA,	)	Case No._____
	)	
Respondent	)	

CERTIFICATE OF SERVICE

This is to certify that the undersigned, counsel for CHARLIE YOUNG, JR., is a member of the Bar of the Supreme Court of the United States, and that he has this date served the Respondent with copies of the attached MOTION FOR LEAVE OF COURT TO PROCEED IN FORMA PAUPERIS, together with the ENTRY OF APPEARANCE AS COUNSEL, the PETITION FOR WRIT OF CERTIORARI, and all attached documents, before the filing of the same, by placing them in the United States mail with sufficient postage affixed to assure delivery, and addressed as follows:

Honorable Michael J. Bowers
Attorney General of Georgia
State Judicial Building
Room 132, Capitol Square
Atlanta, Georgia 30334

Honorable Joseph H. Briley
District Attorney
Ocmulgee Judicial Circuit
Gray, Georgia 31032

Peter J. Rice, Jr., Esq.
Special Prosecutor
P.O. Box 344
Greensboro, Georgia 30642

This the 6th day of September, 1983.

Wade M. Crumbley

WADE M. CRUMBLEY
Crumbley & Crumbley
P.O. Box 775
McDonough, Georgia 30253
(404) 957-1815

IN THE SUPREME COURT

OF

THE UNITED STATES OF AMERICA

CHARLIE YOUNG, JR.,	)	
	)	
Petitioner	)	October Term, 1983
	)	
vs.	)	
	)	
THE STATE OF GEORGIA,	)	Case No._____
	)	
Respondent	)	

AFFIDAVIT OF COUNSEL REGARDING
TIME AND MANNER OF MAILING

Personally before the undersigned officer duly authorized to administer oaths appeared WADE M. CRUMBLEY, who, after being duly sworn, states:

1.

I am counsel for the petitioner in the case captioned above. I make this affidavit pursuant to Rule 28.2 of the Rules of the Supreme Court of the United States.

2.

I personally placed the attached Motion for Leave of Court to Proceed In Forma Pauperis, Petition for Writ of Certiorari, and related materials in the United States mail on Tuesday, September 6, 1983, which date is within sixty (60) days of the entry of the judgment of the Supreme Court of Georgia denying rehearing in this case, if Labor Day (September 5, 1983), a National Holiday, is not counted.

Wade M. Crumbley

WADE M. CRUMBLEY
Crumbley & Crumbley
P.O. Box 775
McDonough, Georgia 30253
(404) 957-1815

Sworn to and subscribed before me
this 6th.day of September, 1983

Notary Public
My commission expires 2/16/87

IN THE SUPREME COURT

OF

THE UNITED STATES OF AMERICA

CHARLIE YOUNG, JR.,	)	
	)	
Petitioner	)	October Term, 1983
	)	
vs.	)	
	)	
THE STATE OF GEORGIA,	)	Case No._____
	)	
Respondent	)	

ENTRY OF APPEARANCE AS COUNSEL

The undersigned hereby makes his appearance as counsel for Charlie Young, Jr., petitioner in the case captioned above.

Wade M. Crumbley

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Office-Supreme Court, U.S.
FILED
OCT 31 1983
ALEXANDER L. STEVAS
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

No. 83-5365

OCTOBER TERM, 1983

CHARLIE YOUNG, JR.

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

MICHAEL J. BOWERS
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JAMES P. GOOGE, JR.
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QUESTIONS PRESENTED

I.

Whether the Supreme Court of Georgia properly determined that Petitioner could be resentenced utilizing statutory aggravating circumstances previously found by the jury in Petitioner's first sentencing trial, where the United States Court of Appeals for the Eleventh Circuit had reversed Petitioner's sentence, but had not reversed the sentence on the basis that there was insufficient evidence to support the aggravating circumstances.

II.

Whether, as a matter of state interpretation of state law, double jeopardy principles do not apply to aggravating circumstances, so as to prevent the submission of an additional aggravating circumstance to the jury at Petitioner's new trial as to sentence?

III.

Whether the Supreme Court of Georgia properly interpreted the decision of the United States Court of Appeals for the Eleventh Circuit in Young v. Zant, 677 F.2d 792 (11th Cir. 1982), as substituting its opinion for that rendered by the district court, so as to reverse the finding of the district court that the aggravating circumstances utilized at Petitioner's first trial as to sentencing were unsupported by the evidence?

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IN THE
SUPREME COURT OF THE UNITED STATES

No. 83-5365

OCTOBER TERM, 1983

CHARLIE YOUNG, JR.

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

PART ONE

STATEMENT OF THE FACTS

Petitioner, Charlie Young, Jr., was tried in the Superior Court of Greene County on charges of murder, armed robbery, and robbery by intimidation on February 18 and 19, 1976. Petitioner received the death sentence for the offense of murder, a life sentence for the offense of armed robbery and a twenty year sentence for the offense of robbery by intimidation. The jury found two statutory aggravating circumstances to authorize the imposition of the death penalty for murder. The jury found the offense of murder was committed while the offender was engaged in the commission of another capital felony, to-wit: armed robbery, as contained in O.C.G.A. § 17-10-30(b)(2) and that the offender committed the offense of murder for the purpose of receiving money, as found in O.C.G.A. § 17-10-30(b)(4). On appeal to the Supreme Court of Georgia, Petitioner's sentences and convictions were affirmed. Young v.

State, 237 Ga. 852, 230 S.E.2d 287 (1976). In its decision on direct appeal, The Supreme Court of Georgia found that the aggravating circumstances found by the jury were supported by the evidence. See Young v. State, supra at 856.

Petitioner subsequently filed a petition for a writ of habeas corpus in state court, which was denied and the denial of state habeas corpus relief was affirmed by the Supreme Court of Georgia in Young v. Ricketts, 242 Ga. 559, 250 S.E.2d 404 (1978), cert. denied, 442 U.S. 934 (1979).

Petitioner then filed an application for federal habeas corpus relief pursuant to 28 U.S.C. § 2254 in the United States District Court for the Middle District of Georgia. On December 5, 1980, the district court entered an order granting the writ of habeas corpus only as it pertained to the imposition of the death penalty, based on the district court's finding that Petitoner's trial attorney deprived him of his Sixth and Fourteenth Amendment rights to reasonably effective assistance of counsel during the sentencing phase of his trial. As an alternative basis, the district court found that Petitioner was sentenced to death based on an improper finding of aggravating cricumstances. Young v. Zant, 506 F. Supp. 274, 280 (M.D. Ga. 1980).

Counsel for both Petitioner and Respondent appealed the order of the district court to the United States Court of Appeals for the Eleventh Circuit. A copy of the brief filed on behalf of the Respondent in the United States Court of Appeals for the Eleventh Circuit is attached as Appendix A to this brief in opposition to the granting of a petition for a writ of certiorari. This brief indicates that the Respondent specifically alleged that the district court had improperly concluded that Petitioner's death sentence was based on an improper finding of aggravating circumstances, because Respondent alleged that the transcript showed that the statutory aggravating circumstances contained in O.C.G.A. § 17-10-30(b)(2) and (b)(4) were supported by the evidence produced at Petitioner's trial.

Following oral argument, the United States Court of Appeals for the Eleventh Circuit found that Petitioner had received ineffective assistance of counsel at both phases of his trial and therefore, granted the writ of habeas corpus with respect to both phases of the trial and reversed the order of the district court. Young v. Zant, 677 F.2d 792 (11th Cir. 1982).

Petitioner was then reindicted in the Superior Court of Greene County for the same offenses for which he was previously tried, i.e., malice murder, armed robbery and armed robbery by intimidation. The district attorney placed counsel for Petitioner on notice of the intention of the state to seek the death penalty utilizing the same two statutory aggravating circumstances as utilized in the original trial and with the additional aggravating circumstance contained in O.C.G.A. § 17-10-30(b)(7). Upon being informed of the intention of the state to seek the death penalty based on these aggravating circumstances, Petitioner filed pleas of double jeopardy with respect to the indictment for armed robbery and with respect to the state's intention to impose the death penalty based on the two original aggravating circumstances and the additional circumstances alleged to be a basis for the imposition of the death penalty by the state.

The trial court denied Petitioner's pleas of double jeopardy in all respects and Petitioner filed an interlocutory appeal to the Supreme Court of Georgia pursuant to O.C.G.A. § 5-6-34(b). The Supreme Court of Georgia upheld the ruling of the trial court denying Petitioner's pleas of double jeopardy, concluding that the effect of the Court of Appeals' reversal of the district court was to "nullify" the opinion of the district court. The Supreme Court of Georgia found no bar to the utilization at Petitioner's retrial on sentencing of the same two aggravating circumstances utilized in Petitioner's first sentencing trial. In a supplemental brief to the Supreme Court of Georgia, the Petitioner raised the allegation that the additional circumstance could not be utilized at the sentencing

phase of Petitioner's resentencing trial, but this allegation was not expressly discussed by the Supreme Court of Georgia in its opinion upholding the denial of the pleas of double jeopardy.

It is from this decision of the Supreme Court of Georgia that Petitioner now seeks review from this Court.

PART TWO

REASONS FOR NOT GRANTING THE WRIT

I. THE SUPREME COURT OF GEORGIA PROPERLY DETERMINED THAT, UNDER THE FACTS OF THIS CASE, THE DOUBLE JEOPARDY CLAUSE DID NOT PREVENT THE UTILIZATION OF TWO STATUTORY AGGRAVATING CIRCUMSTANCES WHICH WERE FOUND TO AUTHORIZE THE DEATH PENALTY AT PETITIONER'S FIRST TRIAL, AS THE CONTROLLING DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DID NOT HOLD THAT THESE AGGRAVATING CIRCUMSTANCES WERE NOT SUPPORTED BY CONSTITUTIONALLY SUFFICIENT EVIDENCE.

Petitioner contends that the double jeopardy clause forbids the state from seeking the death penalty during Petitioner's second trial for the offenses of murder, armed robbery and robbery by intimidation, because the statutory aggravating circumstances utilized were the same two statutory aggravating circumstances utilized at Petitioner's first sentencing trial to authorize the death penalty. Petitioner contends that the district court ruled that there was constitutionally insufficient evidence to support these aggravating circumstances, thus preventing their use at a subsequent retrial as to sentence. While recognizing that the district court had found that the evidence was not legally sufficient to support the jury's finding of the statutory aggravating circumstances contained in O.C.G.A. § 17-10-30(b)(2) and (b)(4), the Supreme Court of Georgia found that it was not bound by the district court's finding with reference to these two aggravating circumstances, so as to prevent the State from

seeking the death penalty based on these same two aggravating circumstances, due to the Supreme Court's interpretation of the subsequent decision of the United States Court of Appeals for the Eleventh Circuit. It should be noted that the Respondent specifically appealed to the United States Court of Appeals for the Eleventh Circuit seeking a reversal of that portion of the district court's order which found these two aggravating circumstances to be unsupported by the evidence. (Appendix A).

The United States Court of Appeals for the Eleventh Circuit did not affirm that portion of the district court's decision finding the evidence to be legally insufficient to support these two aggravating circumstances, but rather, the United States Court of Appeals for the Eleventh Circuit found habeas corpus relief to be warranted based on ineffective assistance of counsel at both the guilt/innocence phase of Petitioner's trial and the sentencing phase of his trial. Young v. Zant, 677 F2d. 792, 798-800 (11th Cir. 1982). Rather, in discussing the claim of ineffective assistance of counsel at the sentencing phase of the trial, the United States Court of Appeals for the Eleventh Circuit merely noted the following with respect to the defense which trial counsel could have mounted concerning the armed robbery charge:

> Turning to the armed robbery, we note the district court, in assessing the sufficiency of the State's evidence of aggravating circumstances on the malice murder charge, concluded that the State did not produce sufficient evidence to permit the jury to find beyond a reasonable doubt that Young had formed the intent to rob Flynt prior to the fatal assault. Young v. Zant, 506 F.2d at 280-281. This deficiency in the evidence should have been sufficiently

> clear to Garland to suggest a strong argument that Young did not rob Flynt by use of an offensive weapon and thus could not be guilty of armed robbery under Ga. Code Ann. § 26-1902.

Id. at 799.

Thus, Respondent submits that the United States Court of Appeals for the Eleventh Circuit did not affirm that portion of the district court's opinion finding as an alternative ground for granting federal habeas corpus relief, that there was legally insufficient evidence to support the two aggravating circumstances. Instead, the court noted that trial counsel could have argued the insufficiency of the evidence to support the armed robbery count and therefore, could have attacked the imposition of the death penalty for murder based on the fact that the murder was committed during the course of armed robbery. Having reviewed the decision of the district court and the United States Court of Appeals for the Eleventh Circuit, the Supreme Court of Georgia correctly made the following observations:

> Rather than reversing in part and affirming in part, the Court of Appeals chose to substitute its opinion for that of the district Court.
>
> We perceive that the effect of this reversal was to nullify the entire opinion of the district court and to place the parties in the position quo ante subject, of course to the holdings of the Court of Appeals. (Cites omitted). It follows that in reviewing the denial of Young's double jeopardy

pleas, we look only to the opinion of the Court of Appeals.

Young v. State, 251 Ga. 153(2), ____ S.E.2d _____ (1983).

Respondent submits that the Supreme Court of Georgia properly found itself governed only by the opinion of the United States Court of Appeals for the Eleventh Circuit in determining whether double jeopardy barred the imposition of the death penalty. Further, Respondent submits that, contrary to the argument of Petitioner under heading III of his brief, that the Supreme Court of Georgia properly interpreted and applied the decision of the United States Court of Appeals for the Eleventh Circuit.

First, the Supreme Court of Georgia disagreed with Petitioner's contention now raised on appeal that the Court of Appeals' reference to the finding of the district court was a holding by the Court of Appeals that the evidence was insufficient to support the second and fourth statutory aggravating circumstances, as well as Petitioner's armed robbery conviction. As already noted, Respondent submits that a review of these two opinions supports the Supreme Court of Georgia's conclusion that the Eleventh Circuit substituted its opinion for the district court and merely referred to the district court's findings, without affirming them. Therefore, as there was no finding of constitutionally deficient evidence to support the aggravating circumstances, there is no basis upon which to invoke the double jeopardy principles cited by Petitioner from Burks v. United States, 437 U.S. 1 (1978), i.e., that if there is insufficient evidence to sustain guilt, retrial of a defendant on the same charge is prevented.

However, the Supreme Court of Georgia went further and assumed the correctness of Petitioner's assertion and noted that the United States Court of Appeal for the Eleventh Circuit had erroneously based its conclusion on an improper construction of the state law as contained in O.C.G.A.

§ 16-8-41. O.C.G.A. § 16-8-41(a) provides that, "A person commits the offense of armed robbery when, with intent to commit theft, he takes property of another from the person or immediate presence of another by use of an offensive weapon . . . ." The Supreme Court of Georgia renewed its original holding made in the direct appeal of Petitioner to that court that without the force utilized by the Petitioner to murder the victim, the robbery would not have occurred and therefore, the murder occurred during the course of an armed robbery under the state court's construction of state law. Young v. State, supra at 117.

The Supreme Court of Georgia properly determined that the evidence in this case with respect to the intent of Petitioner to rob at the time he shot the victim, easily met the test for constitutional sufficiency of the evidence set forth by this Court's decision in Jackson v. Virginia, 443 U.S. 307 (1979). The Supreme Court of Georgia found that the circumstantial evidence in the record established intent to rob at the time of the shooting in accordance with Jackson v. Virginia. The court reaffirmed its earlier holding that the evidence presented in support of the second and fourth statutory aggravating circumstances was legally sufficient. Therefore, the highest court in the state was interpreting the sufficiency of this evidence both under state law and in light of the constitutional standards set forth by this Court in Jackson v. Virginia, and found the evidence presented with respect to the two statutory aggravating circumstances to have been sufficient. Therefore, these two aggravating circumstances could properly be alleged by the state to seek to impose the death penalty at Petitioner's subsequent resentencing trial.

It should be noted that neither the district court nor the United States Court of Appeals for the Eleventh Circuit specifically found that aggravating circumstances (b)(2) and (b)(4) were insufficient under Jackson v. Virginia, supra. Therefore, as there was no constitutional insufficiency found

by either of those courts, the Supreme Court of Georgia properly resolved the question with reference to state law, although concluding on its own, that there was circumstantial evidence in the record to support evidence of intent to rob on the part of the Petitioner at the time of the shooting in accordance with Jackson v. Virginia, supra. As no court has ruled there to be a constitutional insufficiency of the evidence under Jackson v. Virginia, and the controlling Court of Appeals decision granting habeas corpus relief as to sentencing having rested on ineffective assistance of counsel, the Supreme Court of Georgia properly determined that a resentencing of Petitioner utilizing the same two aggravating circumstances originally used to impose the death penalty at Petitioner's first trial was not barred under the double jeopardy clause.

II. GEORGIA LAW DOES NOT PREVENT THE UTILIZATION OF THE ADDITIONAL AGGRAVATING CIRCUMSTANCE NOT UTILIZED AT PETITIONER'S FIRST TRIAL CONTAINED IN O.C.G.A. § 17-10-30(b)(7) IN THE RESENTENCING TRIAL OF PETITIONER.

Petitioner argues in PART II of his petition for a writ of certiorari that the double jeopardy clause forbids the prosecution from utilizing an additional circumstance contained in O.C.G.A. § 17-10-30(b)(7), which was not utilized to impose the death penalty at Petitioner's first sentencing trial. In support of this proposition, Petitioner cites the decision of this Court in Burks v. United States, 437 U.S. 1 (1978). The portion of Burks v. United States, supra, cited by the Petitioner states the proposition that the double jeopardy clause ". . . does not allow 'the State . . . to make repeated attempts to convict an individual for an alleged offense . . . .'". Id. at page 11. However, the Supreme Court of Georgia in

Zant v. Redd, 249 Ga. 211, 290 S.E.2d 36 (1982), found that, "We refrain from equating 'aggravating circumstances' to an offense. (Cites omitted." Id. at 213. In Zant v. Redd, supra, the Supreme Court of Georgia found that this Court's decision in Bullington v. Missouri, 451 U.S. 430 (1981), does not contain language applicable to aggravating circumstances and, " . . . does not mandate a ruling that the failure of a jury to list certain aggravating circumstances in support of the death penalty amounts to an 'acquittal' of those circumstances." Id. at 212.

The recent decision of this Court in Zant v. Stephens, ____ U.S. ____, 103 S. Ct. 2733, 2735 (1983) emphasized the "limited function" served by statutory aggravating circumstances in Georgia's death penalty statute. Therefore, Respondent submits that the state's interpretation of the applicability of this Court's decision in Bullington v. Missouri, supra, to the Georgia death penalty statute controls, so as to allow a prosecutor to add additional aggravating circumstances which may be supported by the evidence offered at the resentencing trial, without violating the double jeopardy clause. See Zant v. Redd, supra at 214. Therefore, this issue presents nothing for review by this Court.

CONCLUSION

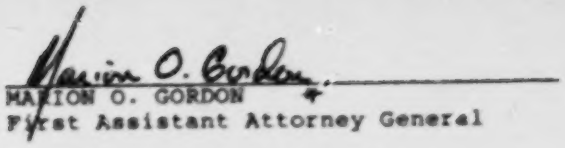
For all of the above and foregoing reasons, Respondent respectfully requests that this Court deny the petition for a writ of certiorari filed on behalf of Charlie Young, Jr. as no substantial federal questions are presented for review by this Court.

Respectfully submitted,

MICHAEL J. BOWERS
Attorney General

JAMES P. GOOGE, JR.
Executive Assistant Attorney General

(Signatures continued)



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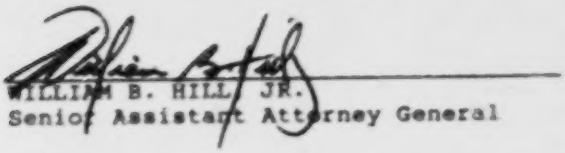

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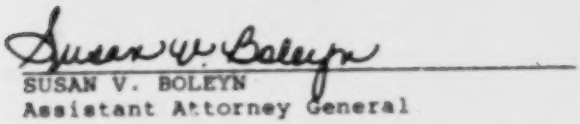

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CERTIFICATE OF SERVICE

I, SUSAN V. BOLEYN, a member of the bar of the Supreme Court of the United States and counsel-of-record for the Respondent, hereby certify that in accordance with the rules of the Supreme Court of the United States, I have this day served a true and correct copy of this brief in opposition for the Respondent upon the Petitioner by depositing a copyof the same in the United States mail with proper address and adequate postage to:

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This 27th day of October, 1983.

Susan V. Boleyn

SUSAN V. BOLEYN
Assistant Attorney General

83-5365

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 81-7123

WALTER ZANT,

Appellant/Cross-Appellee

v.

CHARLIE YOUNG,

Appellee/Cross-Appellant.

On Appeal from the United States District Court
Middle District of Georgia
Athens Division

BRIEF FOR APPELLANT/CROSS-APPELLEE

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APPENDIX A

REASON WHY ORAL ARGUMENT IS NECESSARY

The Appellant suggests that this case is of such character as to justify oral argument and therefore, it should not be placed on the summary calendar. The Appellee, is presently under a death sentence imposed by the Superior Court of Greene County, Georgia, following his conviction in that court on February 19, 1976 of murder, armed robbery and robbery by intimidation. The lower court granted habeas corpus relief as pertained to the imposition of the death sentence. Appellant contends that the sentence of death should be upheld and the findings of the district court overturned by this Court. Oral argument would assist this Court in determining whether the death sentence was improperly vacated by the district court.

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Statutes Cited:

28 U.S.C. § 2254. . . . . 3, 9

Ga. Code Ann. § 27-2534.1 (b)(2). 5, 21, 22,

Ga. Code Ann. § 27-2534.1 (b)(4). 5, 21, 22

STATEMENT OF THE ISSUES

1.

Whether the district court improperly concluded that Appellee's trial attorney deprived the Appellee of his Sixth and Fourteenth Amendment rights to reasonably effective assistance of counsel during the sentencing phase of his trial?

2.

Whether the district court improperly concluded that Appellee's death sentence was based on an improper finding of aggravating circumstances, as statutory aggravating circumstances used to impose the sentence of death in Appellee's case were supported by the evidence produced at his trial?

STATEMENT OF THE CASE

Appellee/Cross-Appellant, Charlie Young, Jr., was tried in the Superior Court of Greene County on charges of murder, armed robbery and robbery by intimidation on February 17, 18 and 19, 1976. Appellee received the death sentence for the offense of murder, a life sentence for the offense of armed robbery and a twenty year sentence for the offense of robbery by intimidation. On direct appeal to the Supreme Court of Georgia, the Appellee had his sentences and convictions affirmed in Young v. State, 237 Ga. 852 (1976). Appellee did not petition to the Supreme Court of the United States for a writ of certiorari.

The Appellee filed a petition for writ of habeas corpus in the Superior Court of Butts County on June 7, 1977 and subsequently filed two amendments to his petition. A state habeas corpus hearing was held on January 3, 1978. Following this hearing, the Superior Court of Butts County found Appellee's contentions to be without merit and ordered that the writ of habeas corpus be denied on January 31, 1978.

Appellee filed a notice of appeal and an application for a writ of certiorari to the Supreme Court of Georgia on February 28, 1978. The Supreme Court of Georgia granted the application for

a writ of certiorari on July 6, 1978. However, the judgment of the lower court was affirmed and rehearing was denied on November 21, 1978. Appellee subsequently filed a petition for a writ of certiorari in the Supreme Court of the United States, which petition was denied by that court in Young v. Zant, 99 S.Ct. 2870 (1979).

Appellee filed an application for federal habeas corpus relief under 28 U.S.C. § 2254 on November 6, 1979. (R., 4-27). An amended petition for writ of habeas corpus was filed on November 27, 1979. (R., 31-50). An Answer-Response on behalf of the Appellant was filed on January 7, 1980. (R., 59-110).

The district court referred the application for a writ of habeas corpus to the United States Magistrate who entered proposed findings of fact and recommendations for disposition on August 7, 1980. (R., 121-130).

On December 5, 1980, the district court entered an order granting the writ of habeas corpus only as it pertained to the imposition of the death penalty, based on the court's finding that the Appellee's trial attorney deprived him of his Sixth and Fourteenth Amendment rights to reasonably effective assistance of counsel during the sentencing phase of his trial

and on the basis that the Appellee was sentenced to death based on an improper finding of aggravating circumstances. (R. 243-254). It is from these portions of the court's order that the Appellant now seeks review from this Court.

A motion for rehearing was filed on behalf of the Appellant on December 19, 1980, but was denied by that court on January 16, 1981. (R. 255-262). Appellee opposed Appellant's motion for rehearing. (R., 263). A motion to stay the judgment of the court was filed on February 5, 1981 and granted on February 5, 1981. (R. 264-269). A notice of appeal was filed February 5, 1981. (R., 267).

The evidence produced at Appellee's trial will be discussed in connection with the allegations of the Appellant in his present appeal.

SUMMARY OF THE ARGUMENT

1.

The district court improperly concluded that Appellee should be resentenced due to alleged ineffective assistance of counsel during the sentencing phase of his trial, citing Fitzgerald v. Estelle, 504 F.2d 1334 (5th Cir. 1974). Appellee's constitutional rights were not violated due to ineffective assistance of counsel during the sentencing phase of the trial and the proper standard to be applied was recently set forth by the Supreme Court of the United States in Cuyler v. Sullivan, 446 U.S. 335 (1980).

2.

The district court improperly concluded that Appellee's death sentence was based on an improper finding of aggravating circumstances, as the transcript, when viewed as a whole, shows that the statutory aggravating circumstances contained in Ga. Code Ann. § 27-2534.1(b)(2) and Ga. Code Ann. § 27-2534.1(b)(4) were supported by the evidence produced at Appellee's trial.

ARGUMENT AND CITATION OF AUTHORITY

I. THE DISTRICT COURT ERRED IN CONCLUDING THAT THE APPELLEE SHOULD BE RESENTENCED BASED ON ALLEGED INEFFECTIVE ASSISTANCE OF COUNSEL DURING THE SENTENCING PHASE OF THE TRIAL.

The district court concluded that the Appellee's attorneys afforded him reasonably effective assistance of counsel during the investigative stage before trial, during the pretrial proceedings and jury selection and during the guilt/innocence phase of the trial. However, the district court concluded that the Appellee did not receive the reasonably effective assistance of counsel during the sentencing stage of the trial. (R., p. 248). The factors upon which the court based this decision were as follows, "the court concludes that Mr. Garland's ignorance of Georgia capital sentencing procedures, his failure to present any mitigating evidence during the sentencing phase of the trial, and his refusal to allow Petitioner to take the stand during the sentencing phase in his own behalf, viewed together, deprived Petitioner during the sentencing phase of

his trial for murder of his Sixth and Fourteenth Amendment rights to reasonably effective assistance of counsel." (R. 252). The court's conclusion when viewed in light of the appropriate standard was erroneous and was directly contrary to the finding of the Supreme Court of Georgia in its review of Appellee's state habeas corpus proceedings. See Young v. Ricketts, 242 Ga. 559, 560-561 (1978).

The district court properly utilized the standard of MacKenna v. Ellis, 280 F.2d 592, 599 (5th Cir. 1960), of counsel "reasonably likely to render and rendering reasonably effective assistance" for determining whether or not a defendant's Sixth Amendment right to counsel has been violated. However, it should be noted that this Court in MacKenna v. Ellis, supra, went further and stated that in determining whether a particular defendant received the effective assistance of counsel, the actions of counsel should not be judged in hindsight, nor must counsel have been errorless in order to be effective.[1/]

1/ Georgia courts have used language similar to that utilized by this Court in interpreting the constitutional right to assistance of counsel by stating that this right "does not guarantee errorless counsel nor counsel judged ineffective by hindsight." See Jones v. State, 232 Ga. 771 (1974); Hawes v. State, 231 Ga. 638, 639 (1974); Fortson v. State, 240 Ga. 5 (1977).

It should be noted that the Appellee's family retained Mr. Reuben A. Garland to represent the Appellee on the charges set forth in the indictment returned by the grand jury of Greene County, Georgia. (State habeas corpus transcript, pp. 33; 57). [2/] Mr. Garland had long been an outstanding attorney as he had been admitted to the bar in 1920. (State habeas corpus order, p. 2 and H.C.T., p. 85). Mr. Garland was assisted by Mr. Frank Petrella (H.C.T., pp. 94-101). Mr. Petrella generally acted as an assistant to Mr. Garland throughout Appellee's trial. (H.C.T., pp. 124-141).

An excellent summary of the evidence produced against the Appellee at trial is contained in the original decision of the Supreme Court of Georgia and Appellee's direct appeal to that court. See Young v. State, 237 Ga. 852, 853-854 (1976). In Sumner v. Mata, 101 S.Ct. 764 (1981), the Supreme Court of the United States determined that 28 U.S.C. § 2254(d) applies to federal determinations made by state courts, whether the court

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[2/] References to the state habeas corpus transcript will hereinafter be designated as "H.C.T." followed by the page number.

be a trial court or an appellate court. Thus, the factual finding of the Supreme Court of Georgia in Appellee's state habeas corpus hearing are presumed to be correct under 28 U.S.C. § 2254(d).

Briefly summarized, the Supreme Court of Georgia found that the Appellee made a statement to police and F.B.I. agents, after having been advised of his constitutional rights. The statement essentially consisted of the following information: Appellee and his nephew, Derwin Young, drove from Atlanta to Union Point, Georgia on December 15, 1975. The Appellee was carrying a .22 caliber pistol in a paper bag in the car. The Appellee first drove to the Farmers Bank and then to the house of the Vice President of the bank, Reuben Flynt. He then drove back to the bank and then returned to Flynt's house. The Appellee went inside the house while his nephew remained outside in the car. The stated purpose of the Appellee in visiting Flynt was to discuss two outstanding loans which he had at the Farmers Bank.

Although the Appellee attempted to enter Flynt's home, Flynt told him to come back and see him in thirty minutes. The Appellee returned to the car and having gotten his .22 caliber pistol went

inside the victim's house and requested the use of the telephone to make a call. After unsuccessfully attempting to call his grandmother, the Appellee again began discussing the outstanding loans with the victim. An argument began, followed by a struggle during which Flynt was hit at least once by the Appellee. The Appellee fired several times at Flynt with the gun and hit him at least once, firing several times at close range. The Appellee ripped the phone from the wall, removed the victim's billfold from his rear pants pocket and then hit him again several times with the gun and possibly another object. It was at this juncture that the Appellee got the idea of trying to get money from the bank. The Appellee stated at the time he left Flynt's house, he did not know whether or not Flynt was dead, although he thought he had killed him.

The Appellee and his nephew drove to the bank and attempted to extort $60,000.00 from a teller. When police were alerted, the Appellee fled and was arrested at his grandmother's house. The .22 caliber pistol was discovered beneath the driver's seat of the car driven by him. The bullets removed from Mr. Flynt's body were fired from the .22 caliber pistol found in the car driven by the Appellee. The evidence also revealed that the victim had two lacerations across his forehead, as well as having received

lacerations on the left side of his chin, and in the back of the scalp, showing that the victim had been hit several times with the butt of the gun. The Supreme Court of Georgia noted that the victim had apparently survived for some period after the infliction of the wounds, but finally died from a loss of blood. See Young v. State, 237 Ga. 852, 854 (1976).

The Supreme Court of Georgia further noted in its decision reviewing the order of the state habeas corpus court denying the Appellee habeas corpus relief that the Appellee voluntarily answered all the questions of law enforcement officials concerning the details of the killing of Reuben Flynt after having been read all of his rights, and even now, does not claim that the statement was involuntary or coerced. See Young v. Ricketts, 242 Ga. 559 (1978). Mr. Garland's performance during the sentencing phase of the Appellee's trial, must be viewed in light of the overwhelming evidence produced at trial of the Appellee's guilt, including, as noted by the Supreme Court of Georgia, Petitioner's own statement to the investigating authority (trial transcript, p. 273-374) and evidence recovered from the automobile driven by the Appellee, including the weapon identified as having fired the bullets which killed the victim. (T. 473-474; 476).

Although the district court concluded that Mr. Garland's alleged ignorance of Georgia capital sentencing procedures rendered him ineffective during the sentencing phase, the Appellant submits that Mr. Garland was hampered in presenting evidence on the Appellee's behalf during the sentencing phase, and arguing from that evidence, not due to any confusion over the bifurcated nature of the trial, but rather due to the Appellee's inability to provide Mr. Garland with useful information or witnesses to present during this phase of trial. In fact, Mr. Garland testified at the state habeas corpus hearing that the Appellee never provided him with the names of any witnesses that he could use at the trial. (H.C.T., p. 89). The Appellee himself admitted that he only provided Mr. Garland and Mr. Petrella with the name of one possible witness and that her name was on the state's witness list. (H.C.T., p. 47-48).

The district court found that Mr. Garland was ineffective because he introduced no evidence on the Appellee's behalf at the sentencing hearing. However, even the district court noted that some mitigating evidence came in during the guilt/innocence phase of the trial, specifically the fact that the Appellee lacked prior convictions and the fact that the Sheriff of Greene County had given the Appellee a favorable job reference. (R., p. 249).

Mr. Garland therefore did attempt to develop mitigating evidence on the Appellee's behalf by questioning witnesses concerning the fact that the Appellee had no prior criminal record more serious than traffic violations, that he was of good character before the crime, and that the Sheriff of Greene County had given him a previous written recommendation. (Trial transcripts, p. 380; 382; 385-386). As previously noted, if, in fact, there were other mitigating factors which could have been presented on the Appellee's behalf, this evidence was not communicated by the Appellee to his attorneys. The Appellant respectfully disagrees with the district court that Mr. Garland was ineffective for failing to present other witnesses as to the Appellee's good employment record or general good character, as this had been brought out during the guilt/innocence phase. It appears that further evidence would merely have been cumulative and achieved no useful purpose at this stage of the Appellee's trial.

The district court also found that the Appellee's retained attorney was ineffective during the sentencing phase by his refusal to allow the Appellee to take the stand in his own behalf during the sentencing phase of the trial. The Supreme Court of Georgia specifically dealt with this allegation in the Appellee's appeal from denial of state habeas corpus relief. Young v. Ricketts, 242 Ga. 559(1)(c)(1978). The Supreme Court of Georgia

initially noted that cases which hold that the right of a person to testify in their own behalf being a constitutionally guaranteed personal right, which cannot unilaterally be waived by counsel are still in the minority. In making this statement, the Supreme Court of Georgia noted the decision of this Court in Winters v. Cook, 489 F.2d 174, 179(6) (5th Cir. 1973), in which this Court stated that among those rights which cannot unilaterally be waived by counsel is "perhaps" the right to testify personally. However, the Supreme Court of Georgia noted that in Winters v. Cook, supra, this "perhaps" was not carried forward and therefore, neither would the Supreme Court of Georgia carry it forward in their opinion. Young v. Ricketts, 242 Ga. 559, 560 (1978).

The Supreme Court of Georgia cited numerous federal cases for the proposition that contentions relating to retained counsel advising a petitioner as to whether or not to take the stand, involves a question of trial strategy. One of the cases cited by the Supreme Court of Georgia was Hayes v. Russell, 405 F.2d 859 (6th Cir. 1969). In Hayes v. Russell, supra, the Court of Appeals for the Sixth Circuit stated that whether or not privately retained counsel should advise a defendant to take the witness stand at trial, was a question of trial strategy. The district court, citing Winters v. Cook, supra, as the case in which

this Court held that the right to testify can only be waived by the defendant and not by his attorney, found that Mr. Garland's failure to allow the Appellee to testify during sentencing, could not be justified on the basis that this was a matter of "trial strategy." The Appellant submits that the district court was clearly in error in making this determination.

First, as noted by the Supreme Court of Georgia, there was evidence produced at the state habeas corpus proceeding that Mr. Garland told the Appellee he would not be permitted to take the stand in his own behalf. (H.C.T., p. 20-21). Associate counsel, Frank Petrella, testified at the state habeas corpus hearing that Mr. Garland had told him that no good would come of letting the Appellee testify because his testimony might inflame the jury and "just hack them off." (H.C.T., p. 130).

The Supreme Court of Georgia also noted that Mr. Garland had consistently argued throughout the trial that the Appellee was "crazy" and not responsible when he murdered the victim. The Supreme Court of Georgia noted that evidence produced at the Appellee's trial had shown him to be "articulate, college-trained and alert." See Young v. Ricketts, 242 Ga. 559, 560 (1978). It can therefore be argued that to allow the Appellee to take the stand, would destroy whatever impression Mr. Garland had pursued

throughout the trial as to Mr. Young's incompetence, by showing him to be intelligent and responsible. Thus, to allow the Appellee to take the stand might negate the impression which Mr. Garland had been attempting to establish through the trial, thereby, erasing any mitigating evidence which had been previously presented on the Appellee's behalf.

The district court makes much of the fact that the Appellee did testify before being sentenced by the ccurt in accordance with the recommendation of the jury, concluding that the statement, if given prior to the jury's consideration of sentence, could have "had a substantial impact" on the jury's decision concerning penalty. However, the Supreme Court of Georgia noted that this statement by the Appellee was ". . . cumulative of character evidence already introduced by counsel during trial, in which he urged he was of good character before the crime; had a family and did not want anyone to believe he was a robber, murderer, extortionist or thief who had to steal, even though the verdict characterized him that way." As this statement was merely cumulative of evidence which the Appellee's attorney had brought out during the guilt/innocence phase of the trial, it is difficult to see how the district court reached the conclusion that the failure to

allow the Appellee to make a similar statement on his behalf during the sentencing phase, constitutes ineffective assistance.

The Appellant respectfully submits that the conclusion of the Supreme Court of Georgia that it was a matter of sound trial strategy for Mr. Garland not to call the Appellee to the stand, is authorized by the evidence and that the district court improperly used this as a factor upon which to base a finding of ineffective assistance of counsel during the sentencing phase.

The district court cites Gregg v. Georgia, 428 U.S. 53 (1976), for the proposition that a defendant should be accorded substantial latitude as to the types of evidence which may be introduced at the sentencing phase of the trial. However, Gregg v. Georgia, supra, also noted that "evidence considered during the guilt stage may be considered during the sentencing stage without being resubmitted. Eberheart v. State, 232 Ga. 247, 253, 206 S.E.2d 12, 17 (1974)." Id. at 164. Therefore, the fact that mitigating evidence produced on the Appellee's behalf was not resubmitted during the sentencing phase, does not constitute ineffective assistance of counsel. Further, the principles of Lockett v. Ohio, 438 U.S. 586 (1978), were not violated in the instant case. The

holding of Lockett v. Ohio, supra, was merely that to meet constitutional requirements, a death penalty statute must not preclude consideration of any relevant mitigating factors. Relevant mitigating factors were presented during the guilt/innocence phase and the jury was not precluded from considering any mitigating factors and therefore, no violation of Lockett v. Ohio, supra, operates to serve as the basis for a finding of ineffective assistance.

Finally, the district court concluded that the proper test by which to judge Mr. Garland's effectiveness was that set forth by this Court in Fitzgerald v. Estelle, 504 F.2d 1334 (5th Cir. 1974), and recently affirmed by this Court in United States v. Guerra, 628 F.2d 410 (5th Cir. 1980). United States v. Guerra, supra, does indeed cite the standard for evaluating the conduct of retained counsel which was enunciated in Fitzgerald v. Estelle, supra. Having cited Fitzgerald v. Estelle, supra, this Court then stated, "see also Cuyler v. Sullivan, ___U.S.___, 100 S.Ct. 1708, 1715, 64 L. Ed.2d 333, 343 (1980)." This reference to Cuyler v. Sullivan, indicated a recognition by this Court that although the standard of Fitzgerald v. Estelle, supra, i.e., that a state prisoner can only win a federal writ of habeas corpus upon a showing that a state participated in the

denial of a fundamental right protected by the Fourteenth Amendment, this Court also recognized that the Supreme Court of the United States had determined that:

> "Since the state's conduct of a criminal trial itself implicates the state in the defendant's conviction, we see no basis for drawing a distinction between retained and appointed counsel that would deny equal justice to defendants who must choose their own lawyers."

Cuyler v. Sullivan, at 64 L.Ed. 2d 333, 344 (1980).

Therefore, the fact that Mr. Garland was retained, or that the trial judge allegedly should have been aware of his error and taken corrective action, are not factors which under the standard of Cuyler v. Sullivan, would determine whether the Appellee received the effective assistance of counsel. Under the present standard, the main consideration must be whether or not counsel's representation rendered the proceedings fundamentally unfair in violation of the Appellee's due process rights. The Appellant respectfully contends that on the basis of the above

and foregoing reasons, the Appellee's right to a fundamentally fair trial was not violated during the sentencing phase of the trial based on any alleged ineffectiveness of his trial attorney. Therefore, the decision of the lower court, granting the Appellee a new sentencing hearing should be reversed.

II. THE DISTRICT COURT ERRED IN HOLDING THAT THE APPELLEE'S DEATH SENTENCE WAS BASED ON AN IMPROPER FINDING OF AGGRAVATING CIRCUMSTANCES, AND THE AGGRAVATING CIRCUMSTANCES CONTAINED IN GA. CODE ANN. § 27-2534.1(b)(2) AND GA. CODE ANN. § 27-2534.1(b)(4) WERE UNSUPPORTED BY THE EVIDENCE PRODUCED AT APPELLEE'S TRIAL.

The district court concluded that the evidence was not legally sufficient to support the jury's finding beyond a reasonable doubt that the Appellee committed the murder in the course of an armed robbery for the purpose of obtaining money, statutory aggravating circumstances contained in Ga. Code Ann. § 27-2534.1(b)(2) and Ga. Code Ann. § 27-2534.1(b)(4). (R., p. 252). The district court concluded that as it had found that the Appellee was sentenced to death based on an improper finding of aggravating circumstances, that he should be resentenced. (R., p. 253). The Appellant contends that the district court

erred in this portion of its order and filed a motion for rehearing in the district court asking that the court reconsider this finding. (R., p. 255-262). The motion for rehearing was denied by the district court on January 16, 1981. (R., p. 255).

As contended in the motion for rehearing, Appellant respectfully submits that the transcript of the Appellee's trial, when viewed as a whole, shows that the statutory aggravating circumstances contained in Ga. Code Ann. § 27-2534.1 (b)(2) that the murder was committed during the course of an armed robbery and Ga. Code Ann. § 27-2534.1(b)(4) that the murder was committed for the purpose of obtaining money, were fully supported by the evidence produced at the Appellee's trial.

The evidence produced at the Appellee's trial has already been summarized in I. of this brief. It should be reemphasized that the Appellee shot Mr. Flynt during a discussion concerning two outstanding loans which the Appellee had at the bank where Mr. Flynt worked. The Appellee fired several times at Mr. Flynt and hit Flynt several times with a gun and possible another object. After Flynt was lying on the floor, the Appellee removed Flynt's billfold from his rear pocket and then decided he would try to obtain money from the bank where Flynt worked. (Trial transcript, p. 372-374). The Appellee specifically stated that at the time

he left Flynt's house, he did not know whether or not Flynt was dead, although he believed that he had killed him. (Trial transcript, p. 374). The Appellee removed Flynt's billfold from his rear pocket, immediately after the shooting as Flynt lay on the floor. The evidence produced at the Appellee's trial reveals that the murder and armed robbery, as well as the attempt to extort money from a teller at the bank where Flynt worked, were part of a continuous transaction by the Appellee.

It is not significant, contrary to the holding of the district court, that the Appellee may not have contemplated the taking of the money until after the shots had been fired and the blows struck. This is evidenced by numerous cases decided by the Supreme Court of Georgia.

In Moore v. State, 233 Ga. 861 (1975), the Supreme Court of Georgia considered the contention of a person under the death sentence that there was no aggravating circumstance supported by the evidence in his case, because allegedly a person could not be guilty of armed robbery if the victim was unconscious or dead at the time of the robbery. In Moore v. State, supra, the defendant fired five shots at the victim and the victim subsequently died from two bullet wounds he received in the chest.

After shooting the victim, the defendant removed two billfolds from the victim's pocket and took the victim's shotgun. The Supreme Court of Georgia found that without the force used by the defendant in Moore v. State, supra, the taking of the billfolds and the shotgun from victim Stapleton would not have been accomplished. The Supreme Court noted, ". . . that Stapleton died from the force used either immediately or subsequently to the taking, does not make the offense any less a robbery." Id. at 864.

Similarly, in the instant case, the fact that it is uncertain whether or not the victim was dead prior to the time that the Appellee stole his billfold, does not affect the use of the commission of the armed robbery as an aggravating circumstance. As in Moore, supra, the taking of the victim's billfold from his pocket would not have been accomplished without the force which was also used to shoot and beat the victim. As previously stated, the murder and the armed robbery were part of a continuous transaction by the Appellee in the space of a few minutes at the victim's home and whether or not the death of the victim preceded the armed robbery does not affect the use of the armed robbery as a statutory aggravating circumstance. The distinction drawn by the district court was an erroneous one.

In Berryhill v. State, 235 Ga. 549 (1975), the Supreme Court of Georgia also upheld the aggravating circumstance of armed robbery used to authorize the death penalty when the defendant, after having shot the victim five times, robbed the defendant's wife. Id. at 555.

As to the resulting attempt to obtain money from the bank where Flynt worked by seeking to obtain $60,000.00 in exchange for Flynt's life, it can again be argued that this was part of a continuous transaction by the Appellee and an act which would not have been attempted, if force had not already been used against the victim with the result that the Appellee believed the victim to be dead at the time of the attempt to obtain money from the bank.

It should be noted that in the decision of the Supreme Court of Georgia reviewing the decision of the state habeas corpus court, the Supreme Court stated, "we no longer permit a death penalty for armed robbery alone (cites omitted), but where the armed robber kills the victim, the armed robbery is properly before the jury as an aggravating circumstance from which a sentence of death can result. Code Ann. § 27-2534.1. Peek v. State, 239 Ga. 422, 432 (238 S.E.2d 12) (1977); Bowden v. State, 239 Ga. 821, 829 (238 S.E.2d 905)(1977)." Young v. Ricketts, 242 Ga. 559, 562 (1978).

It is apparent that under the Supreme Court of Georgia's interpretation of the statutory aggravating circumstance contained in Ga. Code Ann. § 27-2534.1(b)(2), that the commission of the other capital felony, in this case armed robbery, need not occur prior to the murder in order to authorize a death sentence which utilizes this statutory aggravating circumstance. Therefore, the district court improperly interpreted Georgia law in finding that there was insufficient evidence to support this aggravating circumstance and the aggravating circumstance contained in Ga. Code Ann. § 27-2534.1(b)(4).

The Appellant asserts that there was sufficient evidence to support both aggravating circumstances and that Appellee did not be resentenced. However, assuming for the sake of argument, that this Court should find one of the two aggravating circumstances to be unsupported by the evidence, the remaining aggravating circumstance could still be utilized to authorize the death sentence in the instant case, without resentencing the Appellee. Dampier v. State, addendum, 245 Ga. 882 (1980); Burger v. State, 245 Ga. 458, 460-61 (1980); Gates v. State, 244 Ga. 587, 599 (1979), cert. denied, ___U.S.___, 100 S.Ct. 1332 (1980). Therefore, the district court's holding was in error.

CONCLUSION

For all the above and foregoing reasons, that portion of the district court's order finding that the Appellee should be resentenced due to alleged ineffective assistance of counsel during the sentencing phase and an improper finding of aggravating circumstances, should be reversed by this Court.

Respectfully submitted,

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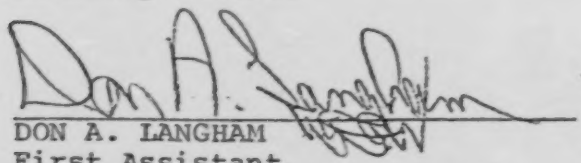

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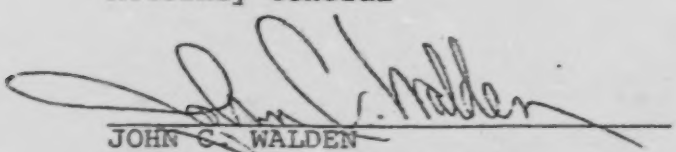

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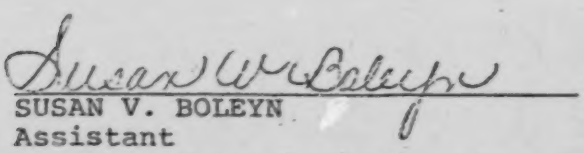

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CERTIFICATE OF SERVICE

This is to certify that I have this day mailed a true and correct copy of the foregoing Brief for Appellant/Cross-Appellee to Appellee/Cross-Appellant's attorney by depositing a copy of same in the United States mail with sufficient postage affixed thereto and addressed to:

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This 1st day of April, 1981.

Susan V. Boleyn

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